

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
a Corporation, CHICAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation, J. E. WOODS and
M. I. CHAPPELL,

Plaintiffs in Error,

vs.

DAVID CLEMENT, as Administrator of the Estate of DAVID
CLEMENT, JR., Deceased,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

Filed

MAR 12 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
a Corporation, CHICAGO, MILWAUKEE & PUGET SOUND
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

GEO. F. SHELTON, Esq., of Butte, Montana,

FRED J. FURMAN, Esq., of Butte, Montana.

A. J. VERHEYEN, Esq., of Butte, Montana,

Attorneys for Defendants and Plaintiffs in Error.

BURTON K. WHEELER, Esq., of Butte, Montana,

HOMER G. MURPHY, Esq., of Helena, Montana,

Attorneys for Plaintiff and Defendant in Error.

[Transcript on Removal.]

*In the District Court of the United States, in and for
the District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOOD and M. J. CHAPPEL,

Defendants.

BE IT REMEMBERED that on the 31st day of
March, 1913, there was filed in the above-entitled
court a Transcript on Removal from the District
Court of the Second Judicial District of the State of

2 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*

Montana, in and for the County of Silver Bow, which said Transcript on Removal contains an Amended Complaint in the words and figures following, to wit:
[1*]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County of
Silver Bow.*

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOOD and M. J. CHAPPEL,
Defendants.

Amended Complaint.

Comes now the plaintiff above named and files this his amended complaint and for cause of action against the above-named defendants complains and alleges, as follows:

I.

That David Clement, Jr., died on the 5th day of November, 1912.

II.

That by an order and judgment duly given and made by the above-entitled Court on the 23d day of November, 1913, plaintiff was appointed administra-

*Page-number appearing at foot of page of original certified Record.

tor of the estate of David Clement, Jr., that he, the plaintiff, immediately on the 23d day of November, 1912, qualified as such administrator and is now the duly appointed, acting and qualified administrator of the estate of David Clement, Jr., deceased.

III.

That the defendant the Chicago, Milwaukee and St. Paul Railway Company is a corporation, duly organized and existing and doing business in the State of Montana. [2]

IV.

That the defendant, Chicago, Milwaukee and Puget Sound Railway Company, at all times herein mentioned was a corporation organized and existing and was at such times the owner and operator of a certain railroad system comprising of tracks, rolling stock and other appurtenances, said railroad system running through and across the county of Silver Bow and the city of Butte, and particularly across that certain public street in the city of Butte known as Montana Street, said crossing being near the junction of Greenwood Street with the said Montana Street. That said street at said crossing is in a thickly populated portion of said city and county and at all times many people travel upon the same, all of which was known to the defendants.

V.

That on the 5th day of November, 1912, David Clement, Jr., was a boy of about the age of fifteen years; that on the said day J. E. Woods was an engineer in the employ of the defendant Chicago, Milwaukee and Puget Sound Railway Company and a

servant of said company, driving a steam locomotive, being operated by the said company on one of its tracks at the time of the accident hereinafter mentioned; that M. J. Chappel was in the employ of the defendant Chicago, Milwaukee and Puget Sound Railway Company as foreman of an engine crew, and at the time of the accident hereinafter referred to was riding upon the engine operated by the said defendant Woods and directed the movement of said engine.

VI.

That on the morning of the 5th day of November, 1912, at about the hour of four o'clock, the said David Clement, Jr., was driving a pair of horses and riding in an enclosed milk-wagon, [3] which was being drawn by said horses, going in a northerly direction on Montana Street, a public street in the incorporated city of Butte, Montana, toward and near the intersection of the defendant Chicago, Milwaukee and Puget Sound Railway Company's tracks and said Montana Street (said crossing being near Greenwood Street in said city), and was not observant of the approach of a train which was running along said track in a westerly direction—the engine being under the control of the said J. E. Woods and the said Chappel and being used at the time for switching purposes in the yards of the said Chicago, Milwaukee and Puget Sound Railway Company; that the said David Clement, Jr., was coming directly within the way of the said approaching train; that the said engineer and the said Chappel did see the said David Clement, Jr., or by the exercise of

ordinary care could have seen him, coming directly within the path of the said engine, and did see or by the exercise of reasonable care on their part, could have seen, that the said boy was in danger of being struck by the said engine, and that the boy was unobservant of the approach of said engine; that the defendants then, after so seeing the boy in danger, negligently and carelessly drove said engine against the vehicle in which the said David Clement, Jr., then and there was, without giving him any warning of the approach of said train and without lowering the gates which were at the said crossing, and by reason of the negligent management and operation of said engine, the said Clement boy was dragged by the same over and along the ground and over and along the railroad track for a great distance, and was drawn and dragged under the wheels of said engine, and the same was then and there run and driven over him, whereby he was crushed, maimed and injured, from which injuries he thereafter died. [4]

VII.

That at all times specified herein the above-mentioned Chappel and the above-mentioned Wood were acting within the course of their employment.

VIII.

That the said David Clement, Jr., was a strong and able-bodied lad of fifteen years of age, of good capacity for and disposition to work, and would have earned much money after he became twenty-one years of age and would have enjoyed a long and happy life.

That the said David Clement, Jr., lived an appreciable length of time after the accident.

IX.

That on or about the 24th day of December, 1912, the defendant Chicago, Milwaukee and Puget Sound Railway Company, a corporation, sold, transferred, set over and assigned and conveyed all of its railroad and property in the State of Montana and elsewhere to the Chicago, Milwaukee and St. Paul Railway Company, a corporation; that in and by the terms of the said sale and transfer of the said property aforesaid from the Chicago, Milwaukee and Puget Sound Railway Company to the Chicago, Milwaukee and St. Paul Railway Company, a corporation, the said Chicago, Milwaukee and St. Paul Railway Company, a corporation, assumed all of the debts and obligations of every kind and character of the said Chicago, Milwaukee and Puget Sound Railway Company, and entered upon the operation and management of the said railroad business formerly conducted by the Chicago, Milwaukee and Puget Sound Railway Company.

X.

That by the acts of negligence on the part of the above-named defendants hereinbefore set out, the said David Clement, Jr., was [5] damaged by the defendants in the sum of Twenty-five Thousand (\$25,000) Dollars; that between the time when the injury was inflicted upon him and the death of the said David Clement, Jr., he had a cause of action against the defendants for said injuries; that the cause of action has survived to this administrator of

his estate and is now prosecuted.

WHEREFORE, plaintiff demands judgment against defendants for the sum of Twenty-five Thousand (\$25,000) Dollars, and for costs of suit.

B. K. WHEELER,
Attorney for Plaintiff.

State of Montana,
County of Silver Bow,—ss.

David Clement, as administrator of the estate of David Clement, Jr., deceased, being first duly sworn, on oath deposes and says: That he is the party named as plaintiff in the above and foregoing complaint; that he has read the said complaint and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge except those matters and things therein stated on information and belief, and as to those he believes them to be true.

DAVID CLEMENT.

Subscribed and sworn to before me this —— day of February, 1913.

[Notarial Seal] B. K. WHEELER,
Notary Public for the State of Montana, Residing
at Butte, Montana.

My commission expires February 15th, 1915.

Service of the above and copy rec'd Feb. 13, 1913.

GEO. F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN.

Filed Feb. 13, 1913. John J. Foley, Clerk.

Filed Mar. 31, 1913. Geo. W. Sproule, Clerk.

That said Transcript on Removal filed herein on the said 31st day of March, 1913, contains a Separate Demurrer of defendant Chicago, Milwaukee and St. Paul Railway Company, in the words and figures following, to wit: [7]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.*

No. A—4799.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPEL,
Defendants.

**Separate Demurrer of Defendant Chicago, Mil-
waukee and St. Paul Railway Company, a Cor-
poration.**

Comes now the above-named defendant Chicago, Milwaukee and St. Paul Railway Company, a corporation, and demurs to the amended complaint of the plaintiff on file herein; and, for cause of demurrer, alleges: That said amended complaint does not state facts sufficient to constitute a cause of action in favor

of the plaintiff and against this demurring defendant.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing Demurrer is hereby acknowledged, and copy thereof received, this 4th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

Filed Mar. 4, 1913. John J. Foley, Clerk.

Filed Mar. 31, 1913. Geo. W. Sproule, Clerk. [8]

That said Transcript on Removal filed herein on the 31st day of March, 1913, contains a Separate Demurrer of the defendant M. J. Chappel, in the words and figures following, to wit: [9]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.*

No. A—4799.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPEL,
Defendants.

Separate Demurrer of Defendant M. J. Chappel.

Now comes the above-named defendant M. J. Chappel, and demurs to the amended complaint of the plaintiff on file herein, and for cause of demurrer, alleges: That said amended complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this demurring defendant.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing demurrer is hereby acknowledged, and copy thereof received, this 4th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

Filed Mar. 4, 1913. John J. Foley, Clerk.

Filed Mar. 31, 1913. Geo. W. Sproule, Clerk.
[10].

That said Transcript on Removal filed herein on the 31st day of March, 1913, contains a Separate Demurrer of the defendant J. E. Woods, in the words and figures following, to wit: [11]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.*

No. A—4799.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPEL,
Defendants.

Separate Demurrer of Defendant J. E. Woods.

Now comes the above-named defendant J. E. Woods, and demurs to the amended complaint of the plaintiff on file herein; and alleges that the said amended complaint does not state facts sufficient to constitute a cause of action against said defendant and in favor of the plaintiff.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing demurrer is hereby acknowledge, and copy thereof received,

12 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*

this 6th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

Filed Mar. 6, 1913. John J. Foley, Clerk.

Filed Mar. 31, 1913. Geo. W. Sproule, Clerk.
[12]

[Order Overruling Demurrers, etc.]

Thereafter, on May 14, 1913, order overruling demurrers was duly made and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, District
of Montana.*

No. 124.

DAVID CLEMENT, Adm.

vs.

CHICAGO, MILWAUKEE & PUGET SOUND
RY. CO. et al.

By consent of counsel, demurrers overruled and defendants granted 20 days to file answer.

Attest: A true copy of minute entry, May 14, 1913.

[Seal]

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy Clerk. [13]

That thereafter, on the 3d day of June, 1913, an Answer to the Amended Complaint was duly filed herein, in the words and figures following, to wit: [14].

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMANY, a Corporation,
CHICAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpor-
ation, J. E. WOODS, and M. I. CHAPPEL,
Defendants.

Answer to Amended Complaint.

Now come the defendants above named; and, for their answer to the amended complaint of the plaintiff on file herein, admit, deny, and allege:

I.

Admit the allegations of the said amended complaint contained in paragraphs I, II, III, V, VII, and IX.

II.

Deny the allegations contained in the last sentence of paragraph numbered IV of said amended complaint.

Admit each and every other allegation contained in said paragraph numbered IV of said amended complaint.

III.

As to the allegations of paragraph numbered VI of said amended complaint, defendants admit that on the 5th day of November, 1912, at about four o'clock in the morning, David Clement, Jr., was driving a pair of horses attached to an enclosed milk-wagon, going in a northerly direction on [15] Montana Street, a public thoroughfare in Butte, toward and near the intersection of the defendant company's railway tracks and Montana Street.

Admit that J. E. Woods was engineer, and M. I. Chappel was foreman of the switching crew.

Admit that the gates were not lowered at that time and place; and admit that David Clement was at that time and place killed in a collision.

Deny each and every other allegation in the said paragraph numbered VI contained.

IV.

Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered VIII of said amended complaint.

V.

Deny each and every other allegation in the said amended complaint contained, not hereinbefore specifically admitted or denied.

WHEREFORE, having fully answered, defend-

ants pray to be hence dismissed, with their costs in this behalf expended.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,
Attorneys for Defendants. [16]

State of Montana,
County of Silver Bow,—ss.

Fred J. Furman, being first duly sworn according to law, deposes and says: That he is one of the attorneys for the above-named defendants, and makes this affidavit of verification on behalf of said defendants for the reason that none of the said defendants or the officers of said corporation defendants above named are at this time present in the County of Silver Bow, State of Montana (where affiant resides), and therefore cannot make said affidavit on behalf of said defendants, or any of them. That affiant has read the above and foregoing Answer, and knows the contents thereof; and that the same is true according to the best knowledge, information, and belief of affiant.

FRED J. FURMAN.

Subscribed and sworn to before me this 3d day of June, 1913.

[Seal]

A. J. VERHEYEN,
Notary Public for the State of Montana, Residing at
Butte, Montana.

My Commission expires Jan. 23, 1915.

Service of the above and foregoing answer is here-

16 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*

by acknowledged, and copy thereof received, this 3d day of June, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

Filed June 3, 1913. Geo. W. Sproule, Clerk. [17]

And thereafter, on the 22d day of May, 1914, the Verdict of the jury was duly filed and entered herein, in the words and figures following, to wit: [18]

In the District Court of the United States, District of Montana.

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpor-
ation, J. E. WOODS, and M. I. CHAPPEL,
Defendants.

Verdict.

We, the jury in the above-entitled cause, find our verdict in favor of David Clement, as administrator of the Estate of David Clement, Jr., deceased, and against the defendants, and we assess the damages of the plaintiff at the sum of \$7,500.00, Seven Thousand and Five Hundred Dollars.

PARKER RAND,
Foreman.

Filed May 22, 1914. Geo. W. Sproule, Clerk.
[19]

And thereafter, on the 28th day of May, 1914, a Judgment was duly rendered and entered herein, in the words and figures following, to wit: [20]

*In the District Court of the United States, District
of Montana.*

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpor-
ation, J. E. WOODS, and M. I. CHAPPEL,
Defendants.

Judgment.

BE IT REMEMBERED that on the 20th day of May, A. D. 1914, at the courtroom at Butte, Montana, in the above-entitled district, the above-entitled cause came on for hearing and trial, Burton K. Wheeler and Homer G. Murphy representing the plaintiff, and Geo. F. Shelton, Fred J. Furman and A. J. Verheyen representing the defendant; a jury of twelve good and lawful men was regularly impaneled and sworn to try the cause; evidence was introduced from sworn witnesses on behalf of the plaintiff and evidence was introduced from sworn witnesses on behalf of the defendant; counsel for the respective par-

ties argued the cause to the jury; the court thereupon delivered to the jury its charge and instructions and thereupon the jury retired to consider of their verdict and subsequently on the 22d day of May, A. D. 1914, returned into court with their verdict in words and figures as follows:

(After Title of Court and Cause.)

We, the jury in the above-entitled cause, find our verdict in favor of David Clement, as Administrator of the Estate of David Clement, Jr., deceased, and against the defendants, and we assess the damages of the plaintiff at the sum of \$7,500.00— [21] Seven Thousand and Five Hundred Dollars.

PARKER RAND,

Foreman.

And thereupon and by virtue of the premises, it is ORDERED, ADJUDGED and DECREED that David Clement, as administrator of the estate of David Clement, Jr., deceased, have and recover of and from the Chicago, Milwaukee and St. Paul Railway Company, a corporation; the Chicago, Milwaukee and Puget Sound Railway Company, a corporation; J. E. Woods and M. I. Chappel, the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), together with costs taxed at the sum of One Hundred Sixty-four 10/100 Dollars, and also interest on both of said amounts at the rate of eight per cent per annum from date hereof until paid, and that he have execution therefor.

Judgment rendered and entered this 28 day of May, A. D. 1914.

GEO. W. SPROULE,
Clerk. [22]

Thereafter, on the 19th day of June, 1914, Petition for a New Trial was duly filed herein, in the words and figures following, to wit: [23]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate of DAVID CLEMENT, Jr., Deceased.
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation, J. E. WOODS and M. J. CHAPPELL.

Defendants.

Petition for a New Trial

Now come the above-named defendants, and petition the Court for a new trial of said cause for the following causes materially affecting the substantial rights of the losing parties in said cause, to wit:

1. Excessive damages appearing to have been given under the influence of passion or prejudice.
2. Insufficiency of the evidence to justify the verdict.

3. Errors in law occurring at the trial.

And, as a specification of the particular errors of law occurring at the trial and relied upon by petitioners, they offer the following, to wit:

1. The Court erred in refusing to grant the motion of the defendants for the Court to instruct the jury to find a verdict for the defendants upon the close of all the testimony in the cause. [24]

And, as a specification of the particulars wherein the evidence is claimed to be insufficient to support the verdict, petitioners set forth and aver the following, to wit:

1. The plaintiff, in order to recover in this action, under the pleadings, must have established by the testimony in the case that the deceased, David Clement, Jr., survived an appreciable length of time after having been hit, and that death was not instantaneous; and there was no evidence whatever introduced at the trial of the cause that the plaintiff did survive any appreciable time, but, on the contrary, the evidence is uncontradicted that death was instantaneous.

2. In order for the plaintiff to recover in this action, it was necessary for him to establish by the testimony in the case that the accident was caused by the negligence of the defendants, and the plaintiff's intestate, David Clement, Jr., was not guilty of concurrent negligence which resulted in the accident and his death; and the uncontradicted testimony in the case is that said David Clement, Jr., was guilty of concurrent negligence which directly caused the accident and resulted in his death.

This petition will be made upon the files and records in this case; and upon the minutes of the Court, including the clerk's minutes and any notes or memoranda which may have been kept by the judge during the trial; and also upon the reporter's transcript of his shorthand notes; and also upon the bill of exceptions prepared and served and to be hereafter settled, allowed, and filed in this cause.

Dated June 19, 1914.

SHELTON & FURMAN,
A. J. VERHEYEN,
Attorneys for Defendants. [25]

Service of the above and foregoing Petition for a New Trial is hereby accepted, and copy thereof received, this 19th day of June, A. D. 1914.

B. K. WHEELER,
H. G. MURPHY,
Attorneys for Plaintiff.

I hereby certify that in my opinion the within and foregoing petition for a new trial is well founded in point of law.

GEORGE F. SHELTON,
Of Counsel for Defendants.

Filed June 19, 1914. Geo. W. Sproule, Clerk.
[26]

That on the 5th day of December, 1914, the Memo. Opinion and Order of the Court Denying Motion for New Trial was duly filed herein, in the words and figures following, to wit: .[27]

[Memorandum Opinion on Petition for a New Trial.]

In the District Court of the United States, District of Montana.

No. 124.

DAVID CLEMENT, Adm.,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO.
et al.,

Defendants.

Defendant moves for a new trial principally upon the ground that the evidence is insufficient to sustain the verdict in that plaintiff did not sustain the burden to establish that his intestate lived an appreciable time after the latter's injuries due to defendant's negligence.

From the most favorable and reasonable aspect that the evidence presented to the jury it appears the deceased in a loaded and enclosed milk-wagon having a glass front and side doors, drove at a slow trot or about five miles per hour along a street eighty feet wide and upon defendant's track crossing the street, and there the wagon was struck by the sloping rear of defendant's switch-engine drawing twelve loaded cars and backing westerly at about

six miles per hour. The engineer had discovered the wagon and applied the brakes. The wagon half supported by the rear of the engine was pushed along the track for about two hundred and fifty feet and until the train stopped. Though the wagon was “smashed” its appearance inspired examination for the driver. Not being found therein further search disclosed deceased’s mangled body under the cars and about one hundred or more feet west of the street. Blood first appeared about fifty feet from the street and of severed portions of the body the first was about ninety feet from the street. Deceased’s head had been severed at [28] the bridge of the nose, “the top gone all the brains scattered,” the left arm had been severed between elbow and shoulder, the left leg at the knee and the right leg just above the shoe top. No other marks or “scratches” appeared upon the body. When found deceased was dead. There was testimony of a sometime in this matter forsworn witness, apparently serving a possible necessity in language nicely calculated to meet the requirements of some authorities, that when found the body “was gasping,” in reference to which the Court instructed the jury they should not credit the incredible, believe miracles, however positively sworn to. Counsel now contend the witness’ credibility and whether or not the deceased was so breathing when found were for the jury,—somewhat daring, to put it mildly.

If the verdict depended in any degree upon the testimony of said witness, a new trial ought to and would be granted. It is clear, however, that the

evidence is of quality and quantity that the case remains unimpeached by said witness and justifies a verdict for plaintiff. From all the facts and circumstances the jury could and did reasonably infer that the collision, not of severity, did not kill deceased and that he lived until he fell from the wagon and was fatally ran over by the train wheels; that this latter occurred where blood first appeared or where the severed part of the body nearest the street was found or where the body was found. This is not mere conjecture but a probable inference that reasonable men might draw. Life is a fact of continuing nature and is presumed to endure so long as in the nature of things it reasonably might; and he who denies it has the burden to overcome the presumption by evidence to the contrary.

At the time of the collision the speed of the train was about $8 \frac{4}{5}$ feet per second and constantly decreased, so that the elapsed time from the point of collision in the center of the street to the points aforesaid, respectively separated by ninety, one hundred and thirty and one hundred and forty feet and more, was at least ten, [29] fifteen and sixteen seconds, respectively. The deceased living so long after the impact, in either case lived an appreciable time, that is, a time capable of measurement, and this cause of action accrued to and survived him. To the contention that death was instantaneous in that it occurred before defendant's negligence ended, it is proper to observe that from a tort of a continuing nature a cause of action accrues at the tort's inception—at the first violation of the

tort-feasor's duty and invasion of the injured person's right, and is not postponed until the tort's end. If one is continuously beaten with gradually increasing force until after some minutes death supervenes, it cannot be successfully contended that death was instantaneous and so either prevented a cause of action from arising or destroyed the cause of action that accrued when the first blow was struck. No more can it in this case of a continuing negligent tort.

The motion is denied.

Filed Dec. 5, 1914. Geo. W. Sproule, Clerk.
[30]

That on February 3, 1915, defendants' bill of exceptions, signed, settled and allowed on October 19, 1914, was duly filed herein, being in the words and figures following, to wit: [31]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation, J. E. WOODS and M. J. CHAPPELL,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that, in the above-entitled action, David Clement, as administrator of the Estate of David Clement, Jr., deceased, plaintiff above named, brought his suit against the Chicago, Milwaukee and Puget Sound Railway Company, a corporation, J. E. Woods, and M. J. Chappell, to recover the sum of \$25,000 because of the death of David Clement, Jr., from personal injuries alleged to have been suffered by the said David Clement, Jr., at the time and in the manner specified in the complaint herein and also in the amended complaint on file herein. [32]

Upon the issues raised by the amended complaint (in which the Chicago, Milwaukee & St. Paul Railway Company, a corporation, was joined as a party defendant in said action), and the answer of the defendants to said amended complaint, the said cause came on for trial on May 20, 1914, before the Court and a jury of twelve persons impanelled and sworn to try the issues in said cause, B. K. Wheeler and Homer G. Murphy, Esqs., appearing as counsel for plaintiff, and Messrs. Shelton & Furman and A. J. Verheyen appearing as counsel for defendants.

Whereupon the following proceedings were had and done, the rulings of the Court hereinafter set forth were made, and the exceptions of the defendants thereto noted: [33]

[Testimony of William Willoughby, for Plaintiff.]

WILLIAM WILLOUGHBY, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My name is William Willoughby and follow the business of mining, and am employed at the Pennsylvania Mine.

On the morning of the 5th day of November, 1912, at about the hour of 4:00 o'clock I witnessed an accident that took place on the South Montana street crossing below the old reduction works. I saw the wreck of a milk-wagon by an engine. This was about 4:00 o'clock, or ten minutes after 4 in the morning. I just forget the number of the house at which I was living at that time, but it was in the two thousand block on South Montana street, and I was just coming off shift at the time I saw this accident. I first saw the team south of the electric light plant on South Montana street about a hundred feet south of the Milwaukee crossing, and saw the train coming down the track at that time, and saw a gentleman, a brakie, on the rear end of the train. The engine was attached to the west end of the train, backing up, the train going westerly. I observed gates at the crossing, but they were not down. Also observed an arc light near the crossing, up over the crossing, within ten or fifteen feet of it. My attention [34] was first called to the train when I was up at about George Berg's cabin.

(Testimony of William Willoughby.)

I saw the man that was on the rear end of the train on that morning jump off the end of the train and stop. Approximately this was about thirty-five or forty feet from the crossing, not over forty feet. At the time this man jumped, the team was approaching the track, or crossing, maybe within ten or twenty feet. There were no headlights on the rear end of the engine. There was a lamp there, but it was not lit. As the train was coming the track the engine was forward on the train and going in a westerly direction. The train was backing and drawing twelve cars.

Q. What, if anything, happened to the wagon after it was struck by the engine?

A. Oh, it looked to me similar to a "cordian"; it was all smashed.

The wagon was pushed in front of the train, or in front of the engine, directly on the track, in front of the step on the engine. The wagon went ahead on the track possibly two hundred feet, just like a sled, as near as I can tell. I don't know whether that is the exact distance, but it is a rough estimate.

With reference to whether or not there was any bell rung on that engine that morning, there was no bell rung; there was a whistle blown up at the switch that turns into the Hazelton Monument Works, which was, approximately, between [35] seven and eight hundred feet from the crossing, around there somewhere. With reference whether or not the engine was making any noise coming down that track, it was pretty well downgrade there, and they chiefly run

(Testimony of William Willoughby.)

down on brakes. I didn't hear any noise at all, only heard the whistle blow at the switch.

This man who jumped off the engine when it was approaching the crossing I saw give a signal, of course, to the engineer. I was standing on the north side of the track, or crossing, on Montana Street, possibly seventy-five yards from the railroad. The engine struck the wagon right in the body of the wagon and the horses were pitched, turned and twisted in every shape, for possible one hundred feet.

Of course, I don't know, or didn't know at that time, the name of the boy that was in the wagon, but I saw the boy this morning of the accident that was in the wagon. After the accident took place I went down to see if the boy was in the wagon or not, but I couldn't find him there.

I made an examination of the engine with reference to a light, and I found the light was damaged by the wagon, and there was no light on, of course. I found the boy, with reference to the crossing, about seventy-five or may be a hundred feet west of Montana Street between the cars, or between the tracks under the cars.

Q. Did you examine the track for the purpose of ascertaining whether or not there was any blood, or anything else on the track? [36]

Mr. FURMAN.—I object to this question as leading, and also suggestive.

Mr. WHEELER.—This is for the purpose of fixing the place, as near as he can, where the body first

(Testimony of William Willoughby.)

struck the track.

Objection overruled.

To which ruling of the court counsel for defendants then and there took and was allowed an exception.

Q. Go ahead now and state,—where would you say that was with reference to being west of the crossing?

A. Where the body laid?

Q. Yes, where the body laid.

A. Around seventy-five feet, may be more.

Q. Well, I am asking you where the point was that you first found any blood on the rail, or on the tracks?

A. Probably half ways from where the body was lying to Montana Street.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I stayed around the place where this accident happened until the train was about to leave there. I don't believe that I stayed until it did leave, I believe it left, possible, when I was up—well, I think I had left before the train pulled out. I did not examine the track at all after the train left. The examination I made was [37] while the train was standing on the track; I had a candle in my pocket and I just took that and lit it and looked along on the south side of the track and there is where the boy lay. You could notice him very plainly. I said that it was on the south side of the track, and I looked in between the rails also. This was while the train was standing on the track, and

(Testimony of William Willoughby.)

just before the undertaker came. I didn't crawl under the cars, I just went down on my knees and investigated. At that time I had no idea that I would be called as a witness in this lawsuit and that was not the reason why I made this investigation.

I am not familiar with switch-engines, though I have seen lots of them. I don't know whether switch-engines are built so they are practically alike on both ends. I know a switch-engine is lighter. This was a switch-engine. It was an engine that they were doing their daily work with. These engines are usually all alike.

Q. Do you know whether it would make any difference whether that switch-engine was running forward or backward? A. Not as far as I know.

I don't think it would make any difference, so far as its motive power is concerned. When this accident happened I was about seventy-five yards north of the track. After the accident happened and the train was stopped I went to the west end, or over toward the west end of the train to see whether the boy was in the wagon or not, and I couldn't [38] find him there, and I went to the south side of the track and I discovered him between the tracks. This man that I said I thought was a brakie that got off the rear end of the train was riding on the rear steps of this engine. By the rear steps I mean the west end of the engine. The engine was going west. I was on the north side of the crossing, and when he got off he got off on the north side of the train. I didn't know at that time who the man was, I couldn't

(Testimony of William Willoughby.)

tell you just exactly his name, I think they called him Chapell. I certainly could recognize him if I saw him, I was pretty close to the man.

Q. Is that the gentleman back there (counsel requesting Mr. Chappell to stand up)?

A. Yes, that is the gentleman.

I saw him get off at the north side of the track. I didn't know who he was before I got up to the track, but this is the man I saw get off on the same side of the track that I was on. When the boy, or the wagon, was struck it was right square on the track. I saw him coming from the opposite side of the track from where I was, about a hundred feet away, coming toward the arc light. That was when I first saw him. I was about a hundred yards north of the track at the time I saw him approaching.

Q. What called your attention to him when you first noticed him?

A. Well, simply because I saw him approaching this arclight, [39] I didn't know what was coming up, I thought it was rather hurried for a milk-wagon. He was just coming along on a slow trot. I didn't notice whether or not there was any effort made on the part of the driver to stop the team; I didn't notice him, or that there was anything wrong until he was on the track and the engine struck him. I noticed the engine coming, and I noticed the lad get off the train, then I afterwards noticed the wagon when it was struck.

Q. What was it directed your attention to the train first?

(Testimony of William Willoughby.)

A. The brakeman got off the engine and then I noticed the wagon.

Q. You didn't notice the wagon until you noticed the train?

A. I noticed the brakeman get off and make his flash to the engineer, then I noticed the wagon on the track.

I noticed the train prior to that time, I saw it coming down the turn, but I didn't know there was any such an accident going to occur. What first directed my attention to the train was, I heard the whistle blow down at that switch, then I saw it approaching the crossing east of Montana Street.

When I saw this man jump off the engine with a light, the head end of the train was possibly forty or forty-five feet, may be fifty feet, from the wagon. The arclight was burning that morning, and also on the east side on the other crossing. There was no headlight on the tail end of that switch-engine that morning, [40] but the lamp was there. When I went down to see the wreck the lamp was there. I can't tell you, correctly, how many cars were on that train that morning, but I would judge, possibly, from ten to twelve. I never noticed whether or not they were loaded; they were chiefly box-cars, I know that. I would know the man that I saw get off the tail end of that engine. I saw him signal to the engineer, I supposed that was what he did; of course, I didn't know what that was, but I thought it was something for quick action, the way he gave it. As to the way in which he gave it, I couldn't tell you

(Testimony of William Willoughby.)

any more than I saw him throw his lamp. That was all on the side of train I was on. I saw somebody in the cab of the engine; there was one or two men, I wouldn't be positive about that—I know I saw one or two men there. I saw at least one, but later when I got to the wreck, I saw these fellows around, of course, I didn't pay any great attention to them.

Q. Now, you stated on your direct examination that the train was coming downgrade noiselessly?

A. I didn't hear a sound of the train—oh, you might hear a little rumbling, but not anything to draw your attention.

Q. You didn't hear the stop-cocks on the locomotive?

A. I am not any locomotive engineer, and I don't know as to that.

I have been around switch-engines and have seen and heard escaping steam and heard the escaping steam when [41] it made a loud noise, and I have seen switch-engines on the track when they made loud noises. I didn't hear any such noise as that on this morning. Neither did I hear any bell ringing at all, not in my presence. I was not over seventy-five yards from the crossing at the time the train crossed it. I saw the boy beneath the train. I didn't help pick the boy up, but I would have assisted if the undertaker hadn't had an assistant with him. I think the name of the undertaker was Warren Richards, and he had an assistant along with him. I didn't examine very closely the head end of the locomotive to see what damage had been done to

(Testimony of William Willoughby.)

it. I stated, I believe, that the light had been injured by the accident. I think the lamp was injured, I noticed the glass was broken. This was on the west end of the engine.

Redirect Examination.

Mr. WHEELER.—Q. When you speak of glass being broken, do you mean the glass in the wagon, or the glass lamp in the engine?

A. Well, there was not much glass left in the wagon.

Q. Did you notice a light in the engine—whether or not there was a light on the engine as it came down around that curve?

A. On the west end of the engine there was no light, just a brakie. [42]

Q. By that you mean what?

A. The brakeman had a lamp in his hand.

He had a lantern in his hand that he gave the signal with. The brakeman was riding on the front step of the engine, or the step on the hind end of the engine, on the north side.

Recross-examination.

(By Mr. FURMAN.)

It was pretty dark at that time in the morning—it was fairly light for a fall morning, it was real dark.

Q. Did you see any effort made by the driver of the wagon to check his team before the accident happened?

A. The only time I saw it was about a hundred

(Testimony of William Willoughby.)

feet south of the track, and I never noticed the wagon any more until it was right on the track, and I don't know whether he made an effort then, or before that, or not, I don't know.

Witness excused. [43]

[Testimony of James B. Glover, for Plaintiff.]

JAMES B. GLOVER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My occupation at the present time is that of time-keeper at the Anaconda mine.

Q. How long have you been employed as such time-keeper?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court counsel for the defendant then and there took and was allowed an exception.

A. About two months.

I was acquainted with David Clement Jr., in his lifetime, and had some business with him. He was working for me on or about November, 1912. He worked for me for a period of about six months—I won't say positively, that is just a guess. He was a boy that I always thought was older than he really was; I understand that he was about sixteen years of age, but I thought he was a boy of about seventeen or eighteen years of age. He was a boy of good

(Testimony of James B. Glover.)

habits, extremely good. He was also a competent boy, a boy that I always could depend upon—that was why I [44] thought he was older than he was.

Q. What have you to say with reference to whether or not he was a strong, healthy boy?

Mr. FURMAN.—I object to this as incompetent and immaterial, and as also calling for the conclusion of the witness.

The COURT.—He may answer. The objection is overruled.

To which ruling of the Court the defendant then and there took and was allowed an exception.

A. Was a good strong boy.

Q. Do you know what common laborers got in this community, when they worked on the service?

Mr. FURMAN.—We object to this as incompetent irrelevant and immaterial. He can testify what this boy was actually getting, but what other laborers got.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. Well, laborers received from \$3.00 to four dollars per day.

They received from three to four dollars a day for surface work and three dollars and a half per day for miners.

Q. What kind of milk-wagon was it that David Clement drove for you?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial, and does not prove or

(Testimony of James B. Glover.)

tend to prove any of the issues in this case raised by the pleadings. [45]

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. This wagon we had had seen about three months service; it was inclosed, it had glass panes in the doors—I couldn't really describe it, the front end of it was glass, but where the driver sits, in order to see on he would have to lean ahead and see through these glass doors. In one of these glass wagons the seat is back of the door.

These were sliding doors that slid toward the rear of the wagon. I noticed the wagon after it was struck.

Q. What have you to say as to the condition of the wagon after it was struck?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial and does not tend to prove or disprove any of the issues raised by the pleadings.

The COURT.—It may be competent to show the speed the wagon was going, and there are other reasons that possibly would make it competent under the pleadings. The objection will be overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. The wagon was pretty demolished, I don't believe there was but a very small per cent of it that could be used again. [46] It was about as well

(Testimony of James B. Glover.)

smashed up as any wagon you ever saw. There was a pretty good load of milk on it.

Q. Empty or full cans of milk?

Mr. FURMAN.—We object to this as incompetent, irrelevant and immaterial. Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. Full cans of milk, and cream bottles.

Q. Do you know whether or not any of the milk was delivered on this particular morning before the accident took place?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial, under the pleadings in this case.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. I know of one customer, that is all; he had six customers to deliver to, but he had six customers and I went to four of the customers and found out where they got their milk.

Q. Where were they with reference—where were these customers with reference to this railroad crossing—the last customer?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and [47] immaterial.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

(Testimony of James B. Glover.)

A. He delivered before going across the track, I think to four houses, before he crossed this crossing.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—Of my own knowledge, I don't know whether David Clement, Jr., delivered milk on that morning or not, any more than from what they told me.

I became acquainted with David Clement out at the ranch. I think some of the boys introduced him to me, brought him out there one day. I cannot recollect at this time who it was brought him out. I do not know anything where David Clement lived at the time I first met him. I have no knowledge of what he was doing at the time I first met him. I didn't know anything about him at the time he came out to the ranch and was introduced to me, of my own knowledge.

Q. Do you know when you first heard of this boy, David Clement, Jr.?

Mr. WHEELER.—I object to this as incompetent, irrelevant and immaterial, and as not proper cross-examination.

Objection sustained. [48]

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

Positively, I don't know for a fact how much I was paying David Clement, Jr., per month during the time he worked for me. He had different salaries. I think he started in at twenty dollars per month.

(Testimony of James B. Glover.)

Q. Did he have anything coming at the time of his death?

Mr. WHEELER.—This is objected to as incompetent, irrelevant and immaterial and as not proper cross-examination.

Objection sustained.

To which ruling of the court counsel for defendants then and there took and was allowed an exception.

During the time I ran the dairy I paid some laborers from three to four dollars a day. I paid one man that. That was one of the drivers. At that time I do not really remember how many common laborers I had employed at the dairy, but I think I can give it to you approximately. I think I had four boys and three men.

David Clement had driven this particular wagon for me prior to the morning of the accident. He used to bring the wagon to me into town. I used to meet him. With reference to where I would meet him would depend. If he was a little late I would go down the road to meet him toward the ranch, but if he was on time he would come to the house for me. I lived at 1020 Nevada, between First and [49] Second on Nevada, which is north of this crossing where the accident occurred; to get to my house it was necessary for him to come over the Montana Street crossing. I can't say whether the boy delivered this wagon to me during the entire six months he worked for me or not, but when I found he was competent, that he would drive the wagon he almost

(Testimony of James B. Glover.)

invariably brought the team in for approximately two months.

Q. That is for sixty days?

A. Yes, fifty or sixty days.

Roughly speaking, during the course of six months he crossed this Montana street crossing fifty or sixty times with this particular wagon. Easily that many times.

With reference to what time in the morning he would usually cross this crossing, I will say that on this morning he was pretty early; he was late the morning before, and I kind of jacked him up a little that morning, and he kind of took it to heart and he came in a little before I expected him, but, generally speaking, he crossed this crossing at fairly a uniform hour, about five o'clock or half-past five o'clock.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—I made some measurements down there at the crossing. There are some houses on Montana Street south of this crossing. I made a measurement of the distance from the crossing to the first house south. [50]. Referring to this map, Plaintiff's Exhibit "A," I made measurement of the distance between the first dwelling-house on the south side of the track to the Chicago, Milwaukee track. That dwelling is on the east side of the street. The distance from that track to a point right opposite the corner of the dwelling was about seventy-six feet. There are other houses farther south of this dwelling.

I found the wagon that morning at a point two

(Testimony of James B. Glover.)

hundred and fifty-five feet from the middle of the road, approximately, it may have been two hundred fifty-seven feet, but over two hundred and fifty feet. I spent probably thirty minutes where I found that wagon that morning.

I made some measurements with reference to switches.

Q. Did you make any measurements with reference to any switches, with reference to the point of contact of the engine with the wagon, that is of any switches and tracks down there west of the track and west of the crossing?

Mr. FURMAN.—I object to any testimony with reference to that switch, or any other switch, as incompetent, irrelevant and immaterial, and does not prove or tend to prove any of the issues raised by the pleadings.

Mr. WHEELER.—I intend to connect this up, if your Honor please.

Objection overruled.

To which ruling of the Court counsel for defendants [51] then and there took and was allowed an exception.

A. I made some measurements from this point. We will call the middle of the road here (indicating), "A," and call this point directly opposite from the house in the middle of the road "B," and we will call the point on a line east of the dwelling and opposite "B," we will call that "E," on the railroad track, and we will call the switch "D"; just west of "A" is the center of the crossing. At the point "E" will be

(Testimony of James B. Glover.)

where the wagon was taken from the switch-engine, supposed to have been. I do not know what the distance from the crossing, or the point marked "A," the point of contact, to this track here (indicating). I didn't measure it. I measured the distance from that point to the switch, marked "D," which was two hundred forty-two feet. I measured the distance from the point of contact, "A," to the point "E" which I have marked directly opposite point "B," which is, I think, three hundred forty-seven feet. The distance from the point directly east of the dwelling-house nearest to the crossing of the railroad track and where the engineer could see this crossing is three hundred and forty-seven feet.

I am familiar with the road down there leading up to the crossing from the south side of the track. The condition of the road at the time of the accident was bad, it was torn up. [52]

Q. For what distance was Montana Street torn up south of the crossing?

Mr. FURMAN.—I object to this as incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. It was torn up over a distance of probably two hundred feet from the track to a point about ten hundred feet west of Montana Street going toward the ranch, that is south, on the side of the cemetery.

The street-car company had excavated in order to

(Testimony of James B. Glover.)

lay their tracks, and they were having trouble, as I understand it, going toward the track, and that road was torn up for two or three months—it was torn up and it was almost impassable. There was a place where they had left a little opening for you to drive down through the excavation, but up on the other side, on the east side by the cemetery, it was straight and we could drive down the road. I didn't make any measurements of the width of Montana Street at the crossing, and do not know what width it is.

Recross-examination.

(By Mr. FURMAN.)

The WITNESS.—This point where I testified that we drove [53] down through this excavation is a point far south of this crossing, I should judge a quarter of a mile.

Q. How about the road immediately to the south of the crossing here (indicating) between the crossing and this house; what is the condition of the road along there?

A. Well, from the crossing to the point "B" was all right, but from "B" is where the excavation starts.

At point "B" is the nearest place where I said you could see the railroad track and the point I have got marked "E" is the farthest point east on the railroad track that you could see, that is the point where the engineer could have seen the boy after he had just come around the corner of the house. At that point the engineer would be three hundred forty-seven feet from the crossing, and the boy would be

(Testimony of James B. Glover.)

a hundred seventy-five feet, or a hundred seventy-six feet, approximately, from the crossing; in other words, just about half as far as the engineer would be from the crossing. From the point where the wagon was taken from the switch-engine to the crossing was about two hundred fifty-five feet, approximately. This switch was two hundred forty-two feet distant from the crossing.

This customer that I spoke of as having received his milk on this morning lives in the house right next to the monument works. That house is not shown here on this map. I did not measure to see how many feet that would be from the crossing. I would not like to make an estimate [54] of about how far it would be, I might be away off, I can't say, it was within, to be sure, six hundred feet, or possibly shorter than that; I feel positive it was a shorter distance than that.

Witness excused.

[Testimony of M. I. Chappel, for Plaintiff.]

M. I. CHAPPEL, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My name is M. I. Chappel and at the present time I am engaged in writing insurance, for an old line company. My occupation on or about November 5, 1912, was that of engine foreman in the charge of the Chicago, Milwaukee and St. Paul Railway Company. I am a codefendant

(Testimony of M. I. Chappel.)

in this case, I believe. On the fifth day of November, 1912, I was in charge of the yard crew for the Chicago, Milwaukee and St. Paul Railway Company, in Butte. My duties were, the direction and movement of the switch-engine and crew, the switch-engine being number [55] 1163, and if I remember right the class of the engine was a "Y-5," which is an ordinary switch-engine. The tank on that engine is what is called a sloping tank and what is, as a rule, used on a properly equipped switch-engine.

At the time this accident took place, there were twelve loaded cars on this engine, loaded with coal and coke. With reference to whether or not there was any air connected with the various cars on that train on this morning, the air-brakes were all connected from the engine to the last car, including the last car. The engine and train were going in a westerly direction, the engine was backing up, the engine being on the west end of the twelve cars, going in a westerly direction. The engine, or train on this particular morning was going at a rate of speed of probably eight or nine miles per hour around that curve. The whistle of the engine was blowing about seven hundred feet east of the Montana Street crossing. The Milwaukee track just previous to its reaching the Montana Street crossing crosses Placer Street, and I know there is a crossing at that point. I am not familiar with Greenwood Avenue and don't know whether that is the name of the street or avenue the track crosses besides Placer Street or not.

(Testimony of M. I. Chappel.)

Q. Calling your attention, now, to this map, Plaintiff's Exhibit "A," I will ask you if it is not a fact that you would have to, before reaching the Montant Street crossing [56] cross this alley here (indicating)?

A. I don't remember as to that alley.

The whistle blew, I say, about seven hundred feet away from the Montana Street crossing. That would be east of the Placer Street crossing. It would be east of the Greenwood Avenue crossing, according to what you say is the name of this street. As to whether the bell was rung on this morning, there might have been a tap of the bell about the time the whistle was blown.

I was riding on that morning, with reference to the engine, on the south side of the footboard on the extreme west end.

Q. I will ask you to state whether or not you were in a position so you could have heard the bell ring, if it was ringing.

Mr. FURMAN.—I object to this as calling for the conclusion of the witness, and as incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. I believe I could have heard it had it been continuously ringing.

Q. I will ask you if it is not a fact that the only time that bell rang, if at all, was at the time the

(Testimony of M. I. Chappel.)

whistle was blowing. [57]

Mr. FURMAN.—This is objected to as incompetent, irrevelant and immaterial, and as asking for mere conclusions of the witness.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. To my knowledge.

Q. And that was about seven hundred feet east of the crossing? A. Yes, sir.

On this particular morning when we crossed the Montana Street crossing, the train was going at about eight miles an hour. I saw the milk-wakon in question on this particular morning about three hundred and thirty or three hundred forty feet from the Montana Street crossing, that is when I first observed it. When I first observed the milk-wagon I should judge it was about one hundred forty, forty-five feet south of the railroad crossing of Montana Street. The team and wagon was going at a rate of speed of about four or five miles per hour. I was watching the wagon up to a point about a hundred and fifty, or maybe two hundred feet from the crossing and I gave the engineer what is known as, the slow signal. The purpose of giving that signal was for the engineer to get his train under control and prepare to make a stop. That signal was given a hundred and fifty or two hundred [58] feet from the crossing. On that particular morning I gave another signal to the engi-

(Testimony of M. I. Chappel.)

neer when the engine was about seventy-five feet, between seventy-five and a hundred feet from the Montana Street crossing. That signal was a positive sign to stop. As I say, when I gave that positive sign to stop the engine was between seventy-five and a hundred feet from the crossing, at which time this boy was about twenty feet from the crossing.

I am familiar with the rules of the company. I said that I was foreman of this crew, or you might say conductor. I was the foreman of the crew. The two positions, foreman and conductor, are relatively the same. I was familiar with the duties of a conductor with reference to the management of a train. The conductor, or foreman, has absolute control of all employees connected with a train. Relative to the rules of the company with reference to the engineer taking his signal from the conductor, it is his duty to take them from him, and obey all signals and act accordingly. And there was no answer made to my signals by the engineer of this particular morning that I could tell. When we got near to the crossing I got off the train, jumped off or stepped off about thirty feet east of the crossing. That was after I had given the signal to the engineer to stop. At the time I jumped off the engine this team of horses' heads were just coming on the crossing, over the rail, the south rail. At the time [59] I jumped the engine it was going at a rate of speed of about six miles per hour, between five and six miles per hour, and I ran along with the engine until the engine struck the wagon.

(Testimony of M. I. Chappel.)

Q. What, if anything, did you do when you jumped from the engine with reference to giving any signals?

A. I don't know how many signals I did give. I don't know how many signals I gave after I was on the ground but I ran along with the rear of the engine until the engine struck the wagon, to see if there was a possible chance for him to get by.

The engineer's position in the cab of that engine was on the south side of the cab, the same side of the engine I was on, and the same side that the wagon was coming from. I gave a wash-out signal, that is an action of the lamp, that was at the time I dropped off, or just prior to the time I stepped off the footboard that I gave that wash-out signal. That was just prior to the time I stepped off the footboard that I gave what is termed a wash-out signal, that is, to stop immediately. The engine struck the wagon on the tracks to the east of the center of the crossing.

There was also a street-car track on Montana Street, that went across this railroad crossing. There were gates at this crossing, which were up at the time, unfortunately.

Q. Was there any flagman at the crossing? [60]

Mr. FURMAN.—We object to this question as incompetent, irrelevant and immaterial, no damage being predicated upon, or based upon, the failure to maintain lights, or to maintain a flagman at this crossing.

The COURT.—The objection is overruled. It

(Testimony of M. I. Chappel.)

might make a difference in the degree of care, or diligence, on the part of the engineer to exercise. If there was a flagman there, the engineer might rely, to some extent, on him, but if there was none there, and he knew it, it might require more diligence on his part.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. There was not.

This accident took place about four A. M. After the engine struck the wagon it dragged it four car-lengths and an engine length, the car-lengths are from thirty-six to forty feet, and the engine is between fixty and sixty feet, approximately, I don't know exactly.

Q. What, if anything, did you do after the engine stopped?

A. When the engine stopped I immediately, or possibly a little before it stopped, I got off the side like of the car, I went over across the draw-heads to the north side of the track—I am not positive whether it came to a full stop at that time or not.
[61]

I saw the boy after the accident. He was in pretty bad condition. I found him between the rails about underneath the draw-heads, a little bit closer to the north rail between the second and third car ahead of the engine.

Q. What have you to say with reference to whether or not he was living or dead?

(Testimony of M. I. Chappel.)

A. Well, I considered he was beyond all human aid at that time.

Q. Did you notice any movements—I will ask you if it is not a fact that—

The COURT.—Do not lead this witness too much. This witness is able to answer without leading him.

Q. What did you notice with reference to any movements of any part of the body?

Mr. FURMAN.—We object to this as leading and suggestive.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. Merely gasping a little, frothing at the mouth, as if in his last struggles for life; I considered him to be beyond all human aid at the time.

He was between the rails of the track at the time. His body was about three car-lengths and one-half, just [62] the exact distance I don't know from the center of the crossing of Montana Street.

Q. State whether or not you noticed any blood or anything else upon the rails of the track prior to the time you saw the body east of a point where you found the body.

Mr. FURMAN.—This is objected to as leading and also suggestive.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and allowed an exception.

A. I don't quite understand your question.

(Testimony of M. I. Chappel.)

Q. Well, was there anything found by you with reference to parts of the body east of the place where you found the body itself, the main portion of the body?

A. Before making my first examination of the body you mean?

Q. At any time?

A. I saw that afterward, yes.

Q. What did you find there?

A. His hand was picked up about, I should judge, ten feet east of the body, picked up by the assistant undertaker, I was with him at the time.

There was nothing else that I could call to mind that was found there.

Q. Was there any blood or anything of that kind?

Mr. FURMAN.—I object to this as leading and suggestive. [63]

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Q. About how far east of the body was it that you found the blood?

Mr. FURMAN.—I object to this as leading and also a repetition.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. If I remember rightly it was between where the hand was picked up and the location of the body.

Where I first saw any of these remains of the body, or signs, was about a hundred and forty-five

(Testimony of M. I. Chappel.)

feet east of the crossing.

Q. At what rate of speed would you say the horses and wagon were moving?

A. About four or five miles per hour probably, the team was jogging, a little jog or trot.

With reference to the condition of the lines on the horses when I saw them, that is when they got into a place where I could see them, the lines were slack. I have seen this paper, the rules of the company, which you now show me, before. Those are the Chicago, Milwaukee and Puget Sound Railway Company's rules. That paper contains the rules of that company and were in effect at the time this [64] accident took place. There is a rule of the company with reference to giving signals before reaching crossings. The rule is that the bell must be rung in approaching all crossings at grade.

Q. What have you to say as to whether or not it should be rung continuously?

Mr. FURMAN.—This is objected to as leading and suggestive.

Objection overruled.

To which ruling of the court counsel for defendants asked for and was allowed an exception.

A. The rules call for the bell to be rung upon approaching all crossings at grade, and continuously rung until the crossing is passed.

Q. I will ask you what tonnage was upon that train that night, if you know?

A. Approximately 700 tons, sixty tons per car.

Q. What was the tonnage of the engine?

(Testimony of M. I. Chappel.)

A. About sixty-five tons, between a hundred forty-five and a hundred and thirty thousand pounds.

Q. What were the requirements of the company with reference to the crews on trains?

Mr. FURMTN.—I object to this as incompetent, and as not being the best evidence.

Objection overruled. [65]

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. A crew consists of a conductor, two brakemen, engine foreman, and two helpers.

Mr. WHEELER.—We offer in evidence Plaintiff's Exhibit "B," and particularly rule No. 94.

Mr. FURMAN.—This is objected to for the reason that it does not appear that the rule was applicable to trains of the class of that train on the morning in question.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Rule No. 94 read in evidence as follows:

"The whistle shall be sounded in accordance with the rules, one-half mile from stations, railway crossings, drawbridges and junctions, also eighty rods from highway crossings; the bell shall be rung and kept ringing until the crossing is passed."

This was about four o'clock in the morning that this happened. It was not what you would call dark, and it was not light. There was an arclight almost directly over the crossing.

Q. For what distance would you say the rays of the

(Testimony of M. I. Chappel.)

arclight were thrown?

Mr. FURMAN.—This is objected to as calling for the conclusion [66] of the witness. The witness is not qualified to give expert testimony.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Probably throw a light for a hundred feet, a reflection.

Q. What have you to say as to whether or not you have seen people passing along that street?

Mr. FURMAN.—I object to this for the reason that it is incompetent, irrelevant and immaterial.

The COURT.—I think it can be assumed that people pass along the street.

Q. I mean at this particular time in the morning, have you seen men pass over these tracks?

The COURT.—I think the question is proper. The objection will be overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. I have seen people passing there at all hours, pedestrians, vehicles passing at all hours of the night over this particular crossing.

This tender that was on the rear end of this engine on this morning was what I know as a sloping tender, it can be termed a fan-tail tender. I have ridden on that engine myself.

Q. How close to the engine could you see an object when [67] you are sitting in the cab of the engine and looking back—how close you could see an object

(Testimony of M. I. Chappel.)
to the rear end of the engine?

Mr. FURMAN.—I object to this as calling for a conclusion on the part of the witness, and as incompetent and immaterial, and for the reason that the witness is not qualified to give expert testimony on this matter.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. By having your head at the window you could see it any time, you could see directly to the wheels of the tender along the rail on this side.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—Describing the shape of this water-tank a little more fully, the tank was on the west end of the engine and the engine was backing up, going west. The slope on this tender begins just back of the coal pit, which is located right next to the cab. This coal pit is probably three feet across by four feet and a half long, and immediately behind that the tender begins to slope. As to how high the top of the tender is from the rail of the track, I don't know, but I should judge that it is about four feet high; I don't think it is any higher than that, possibly not as high. [68]

On this morning I was standing on the extreme southwest corner of the footboard.

Q. I will ask you if one of the stop-cocks were open on the engine as it came around that curve?

(Testimony of M. I. Chappel.)

A. It was not; if it had been we would not have been going.

I don't think that there was any exhaust of steam at all from the engine.

I am not working for the Milwaukee Railroad Company at this time. I didn't quit their employment. What happened was they took me out of service and they have never returned me. I am not discharged, although I am not in their service.

There was practically seven hundred and twenty tons weight on that train on this morning, it may have been less, but I don't think it was any more. There was an air-brake connection made along that train from the engine, the engine included, and they were connected up. The speed as we came around that curve, three hundred and thirty feet, or thereabouts, from the crossing was eight or nine miles per hour. At the time I got off the engine at a point east of the crossing, the speed was five or six miles an hour. When I got off the engine I was about thirty feet from the crossing, at the outside limit.

Q. I will ask you if you did not make a statement over [69] your own signature in making a report of this accident to this effect: "I did not give him a stop signal until I saw we could not avoid hitting the wagon and jumped right after giving signal."

Mr. WHEELER.—I object to this as improper cross-examination. It is improper if it is for the purpose of impeachment. There has been no grounds laid for impeachment as yet.

The COURT.—I think so; he is not asked for his

(Testimony of M. I. Chappel.)

opinion whether or not the engineer could have stopped the train if he gave him the signal. I do not think the proper foundation for impeachment has been laid. The objection will be sustained.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

I can't say that I am familiar with all the street crossings down there. With reference to whether or not I am familiar with the crossings that have been established there at the time I was working there, I will say that I am familiar with the Montana Street crossing and also the Placer Street crossing. I have been crossing the Montana Street crossing at the place where this accident happened for some time, and have been crossing there since the twentieth of June, if I remember. I have been working there from the twentieth of June until this day in question and had frequently been over this strip of track, [70] having gone over it several times each shift. There was a crossing at Placer Street also. I recollect this Greenwood alley, or I know there is a street there, I saw a street but I don't know what the name of it is.

I never heard the bell ring after the whistle was sounded until the accident happened. I didn't hear the bell. I know of no noise emanating from the engine, escaping steam or anything of that kind at that particular point, nothing that I call to mind at the present time. I immediately prior to the time that I stepped off the engine, I was standing on the south corner of the footboard. The footboard runs the full

(Testimony of M. I. Chappel.)

length of the engine, or the tender, and under the draw-head from one end of the tender to the other just in front of the wheel. It runs across the end of the tender, this particular footboard, I was standing on that.

It is usually the duty of the fireman to ring the bell; the bell cord is on his side, but sometimes they have it connected so that either of them can ring the bell, but I believe it is the foreman's to take care of the bell, and it is the engineer's duty to see that he attends to his duty.

I am familiar with engine No. 1163. The bell cord was on the left side of that engine, which is the foreman's side, but I don't remember if the bell cord was connected all the way across so the engineer could reach it or not. [71] The name of the fireman on that morning is Joe Barish, or a name very similar to that. I do not know where he is now.

When I first saw the wagon approaching from the south I was about three hundred thirty or three hundred forty feet from the crossing, and we were going at a rate of speed of between seven and nine miles per hour. The wagon at that time was about a hundred and forty-five feet from the crossing, and was going at a rate of speed of probably four or five miles per hour. I watched, continuously, the approach of the wagon and team from the time I first saw it. There was no effort made on the part of the driver of the team to check or stop it from the time I saw it. I observed the character of the team that was drawing the wagon, and I saw no evidence of fright of the

(Testimony of M. I. Chappel.)

team whatever. Just before the engine struck the wagon, one horse did throw his head up like he had just started to sheer a little bit. That was the first I noticed the horse do anything at all. Up until that time there was no evidence of alarm on the part of the team that I noticed. Up until that time the approach of the team was fairly uniform all the time. I saw no sign of any driver at all. I saw no indication that there was any driver in the wagon. I could see the character of the vehicle itself when it got into the rays of the street lights. The vehicle, or wagon, was about forty or fifty feet from the crossing, [72] possibly more, when it came into the rays of the street lights so you could distinguish and ascertain the character of the vehicle. At that time you could see the lines over the horses' backs. The lines were slack, and there was no evidence of the driver. It was a covered vehicle with glass in front and on the sides. The point at which I gave the first signal to stop to the engineer was about between a hundred and fifty and two hundred feet from the crossing. The place where I stood on this engine was on the same side of the engine that the engineer was on, or supposed to have been on. The first signal I gave him was a slow-down sign. That signal was made by holding the right hand up in such a position as this (indicating). The next signal I gave was stop signal, and gave that signal when we were some seventy-five to a hundred feet away from the crossing. With reference to how long it was that I gave the first signal until I gave the second signal I can only say that in

(Testimony of M. I. Chappel.)

my judgment the engine traveled about a hundred twenty-five feet, I can't tell the exact time it took. I do not care to estimate the time. It would be hard for me to estimate or approximate the time, and I don't care to do it.

Q. Mr. Chapell, will you kindly make an estimate of the time that elapsed after you gave the first signal until you gave the second signal? [73]

A. I don't care to do it, it would be a conclusion and I couldn't estimate with accuracy.

I would not want to give you an estimate of the exact time it was. If I said that it was more than twenty seconds, it would lead to a positive answer, and I wouldn't want to do that. I don't think it was hardly twenty seconds.

I have been in the yard service of the railroad since October 12, 1897, in the neighborhood of sixteen or seventeen years, and have been employed in the capacities of yardman, trainman, brakeman and engine foreman and conductor. During these years I have had occasion frequently to consult a watch and time different things as a railroad man does, but hardly figure down to seconds though. As a matter of fact our watches are regulated with the idea of our being able to get down to seconds, if necessary. I have done that for sixteen or seventeen years, but never had occasion to get down as closely as seconds. During all that time, or nearly all of it, I have had a watch, or supposed to have had. I can't tell you how much of that time I was without a watch, but different times I didn't have one, but arranged to get one

(Testimony of M. I. Chappel.)

as soon as I could; I was supposed to have one.

As to whether the interval of time between giving the first and second signal was as long as fifteen seconds I can't say. It might be eight or nine seconds or ten, and possibly it may have been fifteen. I imagine that it was [74] between eight and fifteen seconds. That is my best opinion at this time, my best judgment. I think that is a fairly accurate estimate of the time. I testified that there was no answer to signals I gave the engineer. I am talking about the same signals that Mr. Wheeler asked me about when I told him that I observed no answer from the engineer.

I have gotten answers to signals that I gave the engineer in the form of a blast whistle. The engineer does not, ordinarily, respond by blowing his whistle when I give him a signal to slow down. He does not respond to the signal to stop by blowing the whistle. I had no reason to expect him to on this occasion. But I expected him to comply with the signals. I did not expect him to answer the signals. The rules of the company provide for an answer to be given to signals under certain conditions. With reference to these two particular signals that I gave, there was no answer required, but it is "action" in that case.

At the time I saw the horses' heads they were just on the rail, on the south rail, at which time I was about thirty feet away, at the farthest. I don't think we were less than thirty feet, or more. I got off this step to get out of the accident; I foresaw myself. It was a precautionary measure with me. I stayed there

(Testimony of M. I. Chappel.)

as long as I deemed it was safe, then I got off. The accident happened almost immediately after I got off, or as soon as [75] the engine could reach the wagon at the rate of speed it was going and the distance it was from the wagon. The horses had gotten across the track when the engine struck the wagon. They had gotten entirely across. There is a foot-board to stand on on the end of the engine on which I stood. The head end of the water-tank hit the body of the wagon. At the time it was hit I was on the south side of the train on the ground.

Q. Now, state whether or not you were in view of the engineer at the time the water-tank, or the tender came along and hit the wagon,—were you in a position where you could have been seen from the north side of the train?

A. No, I was not. I say I was not—my lamp may have been in such a position that the lamp could have been seen before the space was closed up by the tender and the wagon.

Q. After you stepped off on the ground, I mean, could you have been seen from the north side of the train?

A. I ran along with the engine, keeping up with it to see if it was possible that the wagon was going to get out of the way.

I ran along with it until it hit the wagon.

Q. And you kept up practically with the extreme end of it? A. Yes, sir.

I was at the end of the water-tank at the time the water-tank hit the wagon. I did not collide with the

(Testimony of M. I. Chappel.)

wagon [76], myself. I was on the south side of the train. I was not ahead of the water-tank after I got off on the ground; there may have been a possible chance that my light, or lamp, could have been seen before the space was closed up; I am not saying that it was not seen, there was a possible chance that it may have been seen. I kept running with the train at the time the accident happened.

Q. And did you stand there in the road until the train came to a full stop?

A. I stood there until the train was almost to a stop, I don't remember if it was exactly to a full stop, my intention was to get to the other side as quick as possible to see what had happened to the team and the driver, if there was one.

Q. At what point did you cross the train to the north side? A. I couldn't tell you.

Q. Did you do it between the train or climb over any of the cars?

A. I went between the cars, over the draw-heads of the cars.

I don't remember just now which cars I went between. The cars between which I went were in the vicinity of the crossing. I don't remember whether the train was going at full speed when I got across on the other side. I had my lantern in my hand.

With reference to who were the persons on the north side of the train after I got over there [77] I don't know, I didn't see any one, I didn't look, I took a view of the team to see if there was a driver and see if he had hung on to the lines and been pulled

(Testimony of M. I. Chappel.)

over out of the way, and I immediately looked into the wagon and saw that the driver was not there, and I made a search for the driver to see if he was killed, and I went toward the engine and I found him between the second and third cars ahead of the engine. When I got over to the north side of the track I saw the team lying on the side of the track, which was at the end of the train to the rear of the engine. I found the team at the side of the track, about fifty feet, I imagine, from the crossing, probably sixty feet, it may have been a little more, but in that neighborhood. I went to look for the driver, and I found him. I am positive that I was the first one to find him. There was no one else there at the time, that I remember of. I don't know at the present time who was the next man that came there.

Q. Did you say that at the time you saw Mr. Clement he was breathing, that you saw him breathing, saw him gasping?

A. He was gasping at the time I went to him. In the first place I went to him and made this examination, I flashed my lamp in his face and looked at him.

I recall the time that my deposition was taken on the 25th day of February, in Butte, Silver Bow County, Montana, before Charles H. Little, Notary Public, concerning [78] the death of David Clement. I made such a deposition, and remember testifying at that time.

Q. I will ask you whether or not at that time and place Mr. Wheeler asked you this question: "Q.

(Testimony of M. I. Chappel.)

Were there any signs of life in the body at the time that you saw it first," and did you answer: "I could not tell." Did you so testify?

A. Well, I don't remember just how I answered that question, but I am answering it now.

Q. And I will ask whether or not Mr. Wheeler further asked you this question: "Q. You did not make an examination of it close enough to tell whether or not there was any—" and you answered: "No, I did not." Then the question goes on: "Q. —breathing or anything of the kind," and you made the answer: "No, sir." Did you so testify at that time and place?

A. I don't remember at this time, I remember of testifying that I considered him beyond all human assistance.

Q. I will ask you if at that time and place Mr. Wheeler did not ask you this question: "Q. Was any move made by the boy after you saw him?" and you made answer to that question: "A. Not that I could see."

A. Not as to the limbs or any portion of his body, the only movement that was visible at all was his gasping.

Q. Well, I am asking you if you so testified at that time and place? [79]

A. Well, I don't remember now, that has been a long time ago.

Q. I will ask you whether Mr. Wheeler at that time further asked you: "Q. Not that you could see?" and you answered, "A. No." Did you make

(Testimony of M. I. Chappel.)

that answer to that question?

(Hesitation by witness.)

By the COURT.—Q. The question is whether you remember of so testifying before Mr. Little as notary public?

A. I remember that I did testify, but it was two years ago.

Q. Well, do you remember that question being asked you and of giving that answer?

A. Not particularly, no.

Mr. FURMAN.—Q. How long was it after the accident before you saw the body?

A. Saw it as quick as I could get to it.

Q. I will ask you whether or not at the same time and place Mr. Wheeler did not ask you this question: “Q. Were you the first one that saw the body,” and you answered: “A. As far as I know.”

Mr. WHEELER.—He has already testified to that on this trial. That is not proper question of impeachment.

By Mr. FURMAN.—Were you asked this question by Mr. Wheeler: “Q. Could you tell whether or not the boy was breathing any at that time?” and you answered: “A. No, I could not.” [80] Did you so testify?

A. I don't remember what I told you before—you asked me the same question.

Q. Did you take hold of the body at that time?

A. No I did not.

I was at the coroner's inquest held over the body

(Testimony of M. I. Chappel.)

of David Clement on the 13th day of November, 1912, before Louis P. Smith and a jury, but I don't remember who the jury was. I remember of testifying at the inquest.

Q. I will ask you whether at the time you testified at the coroner's inquest Mr. Wheeler asked you this question: "Q. When you first saw the body I presume the man was dead at that time?" and you answered: "A. Yes, sir." Do you recollect whether you testified to that or not at the coroner's inquest?

A. I have not seen the coroner's inquest since.

Q. Do you recollect your testimony?

A. I don't recall exactly what the language was. I don't recall whether I made that answer or not.

I remember of signing a statement as to how this accident happened.

Q. In that statement, I will ask you whether or not in making your report to the company of how this accident happened you made the statement that contained this sentence: "Clement was badly cut and bruised and was dead when we got to him," I show you the statement and ask you [81] if you signed it?

A. As I answered before, practically the same, I did consider him dead, beyond any human assistance.

That is my signature; I signed that statement, but just what it contained I didn't know at the time. After looking at this statement concerning the accident, the statement that was made to the claim department of the Chicago, Milwaukee and Puget

(Testimony of M. I. Chappel.)

Sound Railway Company, it looks similar to the statement I signed, but I have not read it all through. That is my signature to the statement. I signed that statement, without reading it, it was written by Mr. Webb, the claim agent.

Mr. FURMAN.—We offer in evidence the portion of the statement that the witness' attention has been called to, as to the condition of Mr. Clement when he got to him. That is the only portion we care about at this time. I will read it in evidence, which is as follows: "Clement was badly cut and bruised and was dead when we got to him."

The WITNESS.—May I answer that question now? I made the answer at that time that I considered him dead, beyond any human assistance.

By Mr. FURMAN.—Q. Mr. Chapell, I am asking you, did you make that statement to the claim agent?

A. I possibly did if it appears there, although it was signed [82] up without my reading it over, which was very lax on my part.

Q. I will ask you whether or not in your statement to the claim agent with respect to how this accident happened on South Montana Street, in this city, David Clement, who lost his life, whether you made the statement to the claim agent as follows; with reference to the whistle and bell only, I ask you whether you made this statement to the claim agent or not: "We rounded the curve east of the Montana Street crossing,—engineer sounded the regular crossing whistle, engine bell was ringing?"

A. It so appears there. The engine bell rang

(Testimony of M. I. Chappel.)

east of the Montana Street crossing, that is what I said.

Q. But did you make that statement to him, to Mr. Webb? A. No, sir; it is not correct.

At the time the engine collided with this covered wagon, I did not hear any outcry of any kind, not that I remember of.

Q. I will ask you whether or not at the time you attended the inquest over the body of David Clement, Jr., and testified there, whether the coroner asked you to state in your own way just how the accident happened or occurred and whether or not you did not state at that time: "I saw a wagon and team approaching the Montana Street crossing from the south and the team was jogging at an ordinary little gate; there was no effort made and I couldn't tell [83] what the man was doing, but took it for granted that he would stop, as the view was equal; that is, mine and the man driving the team; the engine bell was ringing and I supposed that the man was going to stop." Did you so testify at the coroner's inquest?

A. I didn't testify that the engine bell was ringing at that point, no, sir.

Q. I will ask you whether or not at that time and place Mr. Furman asked you this question: "Q. The bell was ringing and the whistle blowing?" and did I understand you to answer: "Yes"?

A. I did not; it is impossible for anything of that kind to happen.

Q. And I will ask you whether or not you were

(Testimony of M. I. Chappel.)

asked about the exhaust on the engine that morning?

A. Yes.

Q. And you state, did you not, that the exhaust was going and could be heard for three quarters of a mile on a morning like that.

A. I believe that I answered that the engine had an exhaust which could be heard, everything being perfectly quiet in the neighborhood, but I don't believe that I remember of the exhaust coming from her at all.

I don't know whether the exhaust was working that morning or not. I don't see how I could have testified at the coroner's inquest that the exhaust was working on that [84] morning when I didn't hear it at all, I couldn't tell whether it was or not, I left that to the engineer. If I heard the exhaust on that morning I would say so.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—At the time the signal was first given that I have spoken of, it was the regular crossing whistle calling for one long and two short blasts, but they were cut very short, it was the usual habit at that time in the morning not to make any unnecessary noise.

Q. What have you to say with reference to whether or not it was a loud whistle?

Mr. FURMAN.—This is objected to as incompetent and immaterial. He has already testified that it was the regulation crossing whistle that had been given. It is objected further on the ground that it

(Testimony of M. I. Chappel.)

is repetition and improper redirect examination.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. It was not, it was low and indistinct.

With reference to the grade of the tracks there at the crossing, I estimated at about one-half of one per cent at the crossing, a kind of a water-grade. A water-grade is considered a grade where water will run freely of its own accord. [85]

Q. How many times did you visit that body, or see the body on this particular morning?

Mr. FURMAN.—I object to this as not proper redirect examination.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

This statement which was shown to me by Mr. Furman was written by Mr. Webb, the claim agent for the Chicago, Milwaukee and Puget Sound Railway Company. The statement was made sometime after the accident, I don't know just the date; there is no date which appears on the statement. The accident happened on the morning of the fifth, and I don't remember, but it occurs to me that the statement was made at a later date than that, it does not seem to me that it was the next day after the accident. I did not read this statement over before I signed it. I signed it down in the freight house of the Chicago, Milwaukee road, early in the morning, in the agent's office.

(Testimony of M. I. Chappel.)

Q. Will you explain to the jury how, if at all, this wagon was pushed along in front of the engine, if it was dragged by the engine?

Mr. FURMAN.—I object to this as calling for the conclusion of the witness, and not a statement of fact, and as improper redirect examination.

Objection overruled. [86]

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. The wagon was caught on the footboard running along the rear end of the engine and across the rail—it would be about from fourteen to eighteen inches, this footboard, about the rail, and the east side of the wagon was caught on the footboard and slid along on the rail ahead of the engine.

Q. For what distance did that slide along in that manner?

A. It went the distance from the point of the accident to the point where the engine was stopped.

Q. And what distance would you say that was?

A. It was four car-lengths and a half and an engine-length.

Q. With reference to the condition of the body of the wagon, and I particularly refer to the floor of the wagon, did you notice that after the engine had stopped?

A. We picked the wagon and set it over to one side; I can't call to mind now the exact position of the bottom of the wagon, the exact condition, or what it was.

Q. What is your best recollection with reference to

(Testimony of M. I. Chappel.)

the floor of the wagon as to whether or not it was smashed up, or whether or not the floor of the wagon was still in shape?

Mr. FURMTN.—I object to this as repetition, the witness having already answered the question, and as leading and [87] suggestive.

The COURT.—He may answer. I do not remember of it having been answered before.

A. I can't recall as to the exact condition of the bottom of the wagon, although I do recall that the east of the wagon was completely, or almost, torn off, that would be east of the lower side of the top of the wagon.

I spoke about the wagon having been dragged four car-lengths and a half and an engine-length. The space between the cars was about three feet in the clear, and the distance between the tender and the next car to the engine was about the same. With reference to the distance between the tender and the engine, that was not included. The distance between the engine and the first car is about the same distance as it is between two cars.

Recross-examination.

(By Mr. FURMAN.)

The WITNESS.—If I remember rightly, Mr. Lon Stevens, the section foreman, and Mr. Mc-Masters were with me when we picked up the wagon. I testified that after the time I got off the head end of the engine I went up to the place of the accident. I don't remember whether I was exactly on the crossing, or approximately so. At a later time I

(Testimony of M. I. Chappel.)

came around the train and crossed through it. I crossed between the cars over the draw-heads, I jumped through, really. I was not in such a position that I could [88] see what was happening to the wagon after the accident happened up until the time the engine stopped; I couldn't see the full distance.

Q. Then your statement about the manner in which the wagon was slid along the rails is a conclusion from what you afterwards learned, and in other words, not from what you saw of it yourself?

A. It could not have went in any other way.

Q. But is it conclusion from what you know of the accident, and not what you actually saw at the time?

A. I didn't see it, actually, for I was not where I could see it.

Mr. FURMAN.—I move to strike out the testimony of the witness with reference to this, as to the manner of how the wagon slid along the rails for the reason that it is a conclusion and not a statement of any physical fact.

By Mr. WHEELER.—When the engine first struck the wagon you saw it then? A. Yes, sir.

Q. And you saw it for how long a distance after that?

A. I didn't see it after that until after it stopped and I went to the rear end of the engine.

Q. Was the wagon upset?

A. No, sir, only partially.

Motion to strike denied. [89]

(Testimony of M. I. Chappel.)

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

(By Mr. FURMAN.)

The WITNESS.—I remember of being on the witness-stand and testifying in the District Court of this county in the case of James B. Glover against the Chicago, Milwaukee and Puget Sound Railway Company before the Honorable John B. McClernan, Judge, on the 24th day of March, 1914.

Q. I will ask you whether, while you were so testifying upon cross-examination by Mr. Furman you were asked this question: “Q. Now, I will ask you whether there was any other sound coming from the engine on that morning?” and you answered: “A. Why, the exhaust from the pump.”

A. Yes.

Q. And the further question was asked you: “Q. What sort of a noise was that?” and you answered: “A. That is the steam going off, it makes a noise that can be heard at a considerable distance; probably, if it was quiet and everything was still, it could be heard for half a mile.” “Q. As a matter of fact, it could be heard from the round-house up to the Montana Street crossing on a still morning.” “A. Oh, I wouldn’t say that far, unless it was clear and still.” “Q. On this morning what was the condition of the atmosphere and weather?” “A. It was clear and not stormy, or anything I could mention, to speak of.” “Q. Clear, crisp, fall morning?” “A. Yes, sir.” “Q. How far [90] would you say that the exhaust could be heard on this par-

(Testimony of M. I. Chappel.)

ticular morning? Of course, that's purely an estimate." "A. Oh, I imagine, to be safe, it could be heard at least a quarter of a mile."

A. I believe, had the exhaust been working at that time it could have been heard, under those conditions, if the exhaust was working at that particular time—

Q. But the question is, did you so testify or not?

A. Well, if it reads that way on that transcript I must have done it.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—There is no further explanation that I wish to make in regard to this transcript any more than I believe that a certain position of the brake valve governing the exhaust of that air pump—if the brake valve was in a certain position, the exhaust would not be working, although I don't see how I could testify to that unless they were working with it.

Recross-examination.

(By Mr. FURMAN.)

Q. I will ask you if at the time and place mentioned at this other trial, you made answer like this, in response to this question: "Q. Now, I will ask you whether there was any sound given from the engine on that morning?" and you answered: "A. Exhaust from the pump." Did you [91] testify to that on that trial?

A. If it reads that way I possible made that answer.

(Testimony of M. I. Chappel.)

I believe that is the only answer I wish to make. I believe I have answered the question as to whether there was any exhaust coming from the pump that morning. I can repeat it. I can answer as to the exhaust as to my memory, as to whether there was exhaust at that particular time I can't say that there was or was not.

Witness excused. [92]

[Testimony of W. J. McMaster, for Plaintiff.]

Mr. W. J. McMASTER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

My business is that of a switchman and have been employed on the railroad for eight years, having worked for the Penn, the Great Northern and the N. P. On or about the fifth day of November, 1912, I was working for the Chicago, Milwaukee and St. Paul railroad here in the Butte yards. I have heard the testimony given in this case with reference to an accident having taken place on that morning, and remember the time when the accident took place. I was riding on the rear car of this train that had the accident. As to the rate of speed that the train was going around that curve that morning, it was going at from eight to ten miles an hour, when it rounded the curve. At the point where it struck the crossing, the Montana Street crossing, it was going at a rate of speed of about six miles an hour.

(Testimony of W. J. McMaster.)

With reference to whether the bell was sounded on that morning, I think I heard the bell sound, but I didn't hear any steady ring. I heard the bell sound about seven hundred feet east of the crossing. The bell was not rung from that point up until it reached the crossing. I just heard it sounded once, about seven hundred feet east [93] of the crossing. I heard no other noises coming from that engine that morning, only the rattle of the cars.

Q. From your position, and from your experience with railroad cars, could you tell when the brakes were set?

Mr. FURMAN.—I object to this question as calling for a conclusion.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Well, yes, I think the brake was set, or something that we felt that appeared as if the brakes were on, I could feel it coming that way to the hind cars.

The place where the engine was at the time I felt that motion, I imagine, was right at the crossing.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I supposed you could hear the rattling of the cars and the jar of the train on this morning a block or so away; there were twelve loaded cars on this train. The cars were loaded with coal and coke.

As to the weight of the train on this morning, I

(Testimony of W. J. McMaster.)

should say it was about seven hundred and fifty tons, I didn't count it up. This was a bright, cold, crisp morning. I didn't hear any exhaust from the pump on that morning, or the blower on the engine. I was twelve car-lengths from the engine. As to the length of the cars, I [94] will say that they have different length of cars, from forty to thirty-six feet, some are forty feet and some are thirty-six foot cars. The cars on this morning were about that length of cars. The space between the cars is about three feet, and is about the same between the head car and the engine, so that the length of the train, if they were forty-foot cars, would be twelve times forty, which would be four hundred and eighty feet, and then twelve times three are thirty-six,—or five hundred and twelve feet, approximately. Roughly, I would approximate I was five hundred feet from the engine. I suppose that I could hear the noise of that train for a distance of about a block, which is about eight hundred feet, I think.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—We were going down a grade that morning and around the curve. I should judge the grade is about one-half of one per cent, and I was on the rear end sitting on a car.

Recross-examination.

(By Mr. FURMAN.)

The WITNESS.—I never looked at any profile or map, or took any steps to inform myself about what

(Testimony of W. J. McMaster.)

the grade is. I would not say that the grade is three-fourths of one per cent. It is just an estimate on my part.

(By the COURT.) [95]

The WITNESS.—I was not switching these cars; we were going to the B. A. & P. transfer. They were switched already; we were making the transfer to this yard. We worked all night, but not at this particular spot; we worked switching cars back east of there. It is a common thing to transfer these cars through there night or day.

(By Mr. WHEELER.)

The WITNESS.—The air was coupled on to these cars on this morning, and coupled to the engine.

Witness excused. [96]

[Testimony of L. S. Groff, for Plaintiff.]

L. S. GROFF, a witness called on behalf of plaintiff, after first being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My business has been that of a railroad man for the past twelve years, having been with the Northern Pacific, Great Northern, Milwaukee, Western Pacific and Denver and Rio Grand. On the 12th day of November, 1912, I was in the employ of the Chicago, Milwaukee and St. Paul Railway Company. I am familiar with the switch engine known as No. 1163. I have operated that engine, it being under my charge as an engine foreman. Since I have been employed as a railroad

(Testimony of L. S. Groff.)

man I have acted in the capacities of freight brakeman, freight foreman, passenger conductor, switchman, switch foreman and yardmaster. I was engaged with the Milwaukee Company as a switch foreman, and also as engine foreman.

Q. Have you ever observed how quickly cars can be stopped when they are going at various rates of speed?

Mr. FURMAN.—I object to this question as calling for the conclusion of the witness on matters of air-brakes, and upon a matter which the witness is not qualified at all to give an expert opinion.

Objection overruled. [97]

To which ruling of the Court counsel for defendants then and there asked for and was allowed an exception.

A. Yes, sir.

I have observed it when the engine was attached to numerous cars. I was familiar with engine numbered 1163. I worked with that engine from September 9 or 10, 1912, until some time in September, 1913, when the engine was sent here.

I am also familiar with the grade of the railroad tracks of the Chicago, Milwaukee and St. Paul Railroad at the intersection of Montana Street with the Chicago, Milwaukee and St. Paul railroad track near Greenwood Street in the city of Butte. I have had occasion to switch cars in and around that place, and on that grade.

Q. I will ask you to state, in your opinion, in what distance that engine attached to twelve cars loaded

(Testimony of L. S. Groff.)

with freight weighing approximately seven hundred fifty tons, going at a rate of speed of six miles per hour over the railroad tracks of the Chicago, Milwaukee and St. Paul Railway Company on the curve as it rounds the intersection of Montana Street in the city of Butte, near Greenwood Street, running at the rate of about six miles an hour, and assuming that the air was connected with all these cars, also assuming that the engine was backing up with twelve cars attached to it?

Mr. FURMAN.—I object to this for the reason that the [98] *that* hypothetical question omits certain elements that are absolutely essential to be incorporated in the question, there being included in the question nothing with respect to the character of the rail or the atmospheric condition which would affect the rail; and nothing with respect to the diminution of the braking power during this time, or on the morning prior to the application of air to the time about which inquiry is being made; nothing with respect to the question as to whether or not the braking apparatus had been used at any time or at all during the few minutes preceding.

The COURT.—I think the question is sufficiently full. He may answer. The objection is overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Fifteen feet.

Mr. FURMAN.—I object to it further for the reason that it called for the conclusion of an expert on a matter of which the witness has not qualified to

(Testimony of L. S. Groff.)

give expert testimony.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Q. What was your answer?

A. Fifteen feet.

I stated that I was familiar with this particular engine. [99]

Q. What kind of a light has this engine upon it?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial for any purpose.

Mr. WHEELER.—I expect to follow this up by showing the kind of light it was.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

There was a kerosene headlight on the hind end of that engine, and there was also a light of the same kind on the head end.

Q. What have you to say with reference to the jar of the engine, whether or not there is a jar to the engine? A. Yes, there is.

Q. Is there any unusual jar on the engine?

Mr. FURMAN.—This is objected to as leading and suggestive.

Q. Well, state what its character is, the jar to the engine?

Mr. FURMAN.—I object to this as incompetent, irrelevant and immaterial, and does not prove or tend to prove any of the issues raised by the pleadings.

Objection overruled.

(Testimony of L. S. Groff.)

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. There is a certain amount of slack, apparently, between the engine and tender where it is coupled together. [100]

Cross-examination.

(Mr. FURMAN.)

The WITNESS.—I first became acquainted with the engine No. 1163 about September 25, 1912, the first time I worked around it. I said I saw the engine previously, but hadn't been close to it. I think you understood me to say it was November 9 that I first began to use this engine, or when I took charge of it. I had ridden on, and used it prior to November 9.

On the fifth day of November, 1912, I was employed as a switchman. I was working extra, day and night, at different times. I have not run an engine, I am not an engineer.

Q. When and where have you tested engines so you know within what space they can be stopped?

A. From my own personal experience.

I have had experience of that kind on the Chicago, Milwaukee and St. Paul Railway.

Q. Where did you ever see an engine of this kind brought to a full stop within the distance of fifteen feet under conditions like those in this case?

A. My experience as a foreman of an engine; it is my duty to give my engineer signals to stop his train in spotting cars, etc.

Q. You have seen an engine, under circumstances like these, brought to a stop in fifteen feet?

(Testimony of L. S. Groff.)

A. Yes, sir. [101]

I have seen that done in the Butte yards, but not at that same crossing. I have seen it done in the Butte yards many times. I can't tell you just the times when I have seen it done.

Q. What circumstances fix such an incident on your mind, an incident when you saw a seven hundred fifty ton train stopped by an engine of the type and capacity of the engine 1163 in a distance of fifteen feet—did you ever see such a thing happen?

A. Yes, sir.

Q. Well, what fixes that fact on your mind?

A. Because I have done it.

Q. You have done it yourself?

A. Yes, sir, in spotting cars.

Q. When did you ever do it?

A. I have done it since I have been in the service of the Chicago, Milwaukee and St. Paul road.

I didn't keep track of the times that I have done it. I have done it several times in the Butte yards in spotting cars on the scales. We have brought trains of loaded cars right on them and shoved them on the scales going at the rate of six miles an hour. Six miles an hour is not very fast, I can walk that fast, and I have walked ahead of cars when they were going that fast, and in such a position I have seen them stopped in ten or fifteen feet. I have seen cars stopped in that space going at a rate of [102] five or six miles an hour. I have spotted cars of concentrates in the Milwaukee yards. This would be when

(Testimony of L. S. Groff.)

I was approaching the scales to weigh the concentrates.

Q. Are the scales at which you weigh the concentrates upon a grade of three-fourths of one per cent?

A. Practically the same at these scales as it is at the crossing; about the same as the crossing, I should judge.

With reference to the distance that these scales are from the crossing, the scales are in the Butte yards and the crossing is on Montana Street. I did not say that the Butte yards are all on the same grade as that of the Montana Street crossing. At the point where the scales are there is a little grade. I said that I knew the per cent of grade at the crossing of Montana Street. I judge it to be one-half of one per cent; that is my opinion. That is practically the same grade as at the scales. I said I have observed the distance in which I have made that stop within fifteen feet while I was switch foreman. I have observed it numerous times, stopping cars of stock. I have shoved up from seven to eight, ten and twelve cars of concentrates to the scales at a time. I have not frequently seen twelve loaded cars shoved up to be weighed at once. I don't know that I have seen that particular number of cars shoved up at one time.

I know something about the braking efficiency of air [103] on cars from my own practical experience.

Q. If you can stop twelve loaded cars in a distance of fifteen feet, how long would it take you to stop twelve empty cars—in what distance?

(Testimony of L. S. Groff.)

A. Well, they should be stopped as quick, if not quicker.

I would estimate the greatest distance that would be required to stop twelve empty cars going at six miles an hour, at ten feet. The weight of an empty car is from eighteen to twenty-two tons, or from thirty-six to forty-four thousand pounds. As to the weight of a loaded car, depends upon what it is loaded with. If it is loaded with coal and coke the weight would run from fifty to sixty, sixty-two or sixty-four tons to the car, or a hundred and twenty-five thousand pounds, depending upon the size of the car and what it was loaded with. A loaded car of coal will weigh about a hundred and twenty-five thousand pounds, around there some place. Forty thousand pounds is a fair estimate of the weight of an average car. I don't know whether an extra loaded car, including the car, itself, will run as high as a hundred fifty to a hundred and seventy or a hundred and eighty thousand pounds. These gondola cars will run about sixty to sixty-five tons. I think there is a greater braking efficiency when the car is loaded than when it is empty. I think a loaded car will stop quicker than it would if it was empty, or as quick—I wouldn't say quicker, but as quick. [104].

Q. Don't you know, as a matter of fact, that an empty car is arranged with a braking apparatus that has about a seventy per cent efficiency; that is to say, a car that weighs forty thousand pounds will have a braking efficiency of between seventy and ninety per cent, from twenty-eight thousand pounds to thirty-

(Testimony of L. S. Groff.)

five thousand pounds braking efficiency?

A. Yes, sir.

I say, in my opinion, you can stop a loaded car practically as quick as an empty, under these conditions. An empty car, we will assume to weigh forty thousand pounds, and you can stop it under these conditions within a distance of fifteen feet. Under the condition that has been named in this case, if the car is loaded to a hundred thousand pounds, it can be stopped in fifteen feet. I am still working for the Milwaukee.

Q. Have you been discharged, or are you in their service now?

A. Yes, I worked my last shift on December 23d.

Q. You have had a claim for damages which has been settled?

Mr. Wheeler was my attorney and secured a settlement against the Milwaukee road for alleged damages.

(By the COURT.)

Q. You did not mean that you were now working for the company? [105]

A. I have not been discharged.

Q. But you are not working for the company?

A. No, sir.

Q. You think you may be called at any time?

A. So far as I know, I don't know anything to the contrary, I went to the railroad office and made inquiry, and they told me if there was anything against me they knew nothing of it.

Witness excused.

[Testimony of W. A. Ury, for Plaintiff.]

W. A. URY, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My occupation is that of a railroad man, having followed that line of work nineteen years, last fall. I have acted in the capacity of brakeman, conductor, switchman, and assistant superintendent, or trainmaster. When I speak of being a conductor, I meant that I had been conductor on both freight and passenger trains. I have [106] worked on the Lake Shore, the Pennsylvania Line, the C. H. D. Big Four, the Canadian Northern, the Great Northern, the Milwaukee, the O. R. & N. and the Northern Pacific. This has been during the past nineteen years.

Q. Have you had occasion to observe in what distance engines attached to cars could be stopped?

Mr. FURMAN.—This is objected to for the reason that the question is too indefinite to permit of an intelligent answer.

A. Yes, I have observed them.

Q. Under what conditions have you had occasion to observe them? A. Under all conditions.

Q. What were you particularly doing at the various times when you observed it?

Mr. FURMAN.—I object to this for the same reason I objected to the last question, and as repetition.

Objection overruled.

To which ruling of the Court counsel for defend-

(Testimony of W. A. Ury.)

ants asked for and was allowed an exception.

A. Well, in all the different capacities that I have been engaged in.

I have never run an engine as an engineer.

Q. I will ask you Mr. Ury, assuming that an engine was backing, a switch engine, weighing sixty-five tons, I think the evidence shows, fifty or sixty tons, was backing [107] and drawing twelve cars loaded to a capacity of about seven hundred and fifty tons, going at a rate of six miles per hour around the curve, a slight curve, and going down a grade of about one-half of one per cent, downgrade, where the air is connected with all cars from the engine, and assuming that the engine was in good condition, how long, or in what distance could you stop that engine, or in what space could you stop it, under these conditions?

Mr. FURMAN.—I object to this question on the ground that it is a hypothetical question and does not include all the essential elements that should go into a question of that kind.

The COURT.—This witness is speaking from his practical experience. The court thinks it is sufficient, he may answer.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Under the conditions you have named, I would say not to exceed fifteen feet.

I know what a fan-tail tender is.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I never ran an engine myself as

(Testimony of W. A. Ury.)

an engineer. I have seen trains brought to a stop under the circumstances as outlined by counsel for plaintiff here, time without number, and if you wish one particular instance I will give it to you. Under the same circumstance [108] would be the same working action of air, the same braking power and action, practically the same emergency space of air on the engine.

Q. I don't care anything about that, I would like to have you answer my question that was asked, I have asked you if you ever saw a train brought to a stop under the circumstances as outlined by counsel for plaintiff here. Answer the question if you can.

A. I will give you another.

Q. I am asking you for the one instance?

A. On the 25th of June, 1909, on the Canadian Northern.

Q. Can you think of any other instance?

A. Not as to any exact date.

The Gondolas vary in weight. They vary from eighteen to twenty-two tons, weigh about thirty-six thousand pounds. The weight of a Gondola car of this size, loaded with coal would run about seventy tons, the Gondola and load. A Gondola car loaded can be brought to a stop in practically the same space as an empty Gondola, under the same conditions.

Q. Do you know the braking efficiency of an empty Gondola of eighteen tons, what percentage of the weight of the car can be applied to the shoes of the brakes?

A. No, not as to the exact percentage, technically I don't.

(Testimony of W. A. Ury.)

Q. It is from seventy to ninety per cent. Well, I would not say as to the exact per cent, as to the [109] technical part of it.

I do know about how quick it can be brought to a stop without knowing it from a technical standpoint.

Q. Assuming that you have got an empty gondola that weighs eighteen tons, and then in that Gondola you put a load of fifty-two tons, so that the entire Gondola and load weighs seventy tons. Now, then, what has been the effect on the braking power by putting in that load of fifty-two tons? Would it increase or decrease the braking power?

A. Under the circumstances, it has not effected it perceptibly at all, under the circumstances mentioned.

Q. Has the brake-pipes or air reservoirs been changed by putting in the load? A. No.

Q. The braking apparatus is just the same in all respects as before putting in the load.

A. Yes, sir.

Q. You say it was just as easy to stop it as it was, going six miles an hour, just as easy to stop an eighteen-ton Gondola, loaded or unloaded, under these circumstances?

A. Practically the same, under the same circumstances.

Q. You are the same Mr. Ury who testified against the Milwaukee in a case in the District Court entitled A. B. ——— vs. Milwaukee and St. Paul Railway Company? A. Yes, sir.

Q. And you have at this time a personal injury

(Testimony of W. A. Ury.)

lawsuit of [110] your own, in which Mr. Wheeler is your attorney, pending against the Northern Pacific? A. Yes, I have a case.

The case is for damages which I allege I sustained in the railroad service. Prior to that I made no settlement for any other injury.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—I witnessed the accident to Mr. Page, the case in which I testified against the Milwaukee, which occurred in the Harlowton yard. I was working for the Milwaukee at the time.

Q. You said, in answer to Mr. Furman, that a Gondola loaded, or empty, could be stopped in practically the same distance going at a rate of six miles per hour. Just explain to the jury why that is.

A. Well, the weight, going at that rate of speed, the weight of the car, the displacement, would not have any effect going at that speed, over the empties.

Q. Supposing it was going at a rate of twenty miles per hour?

A. That would increase it slightly.

Recross-examination.

(By Mr. FURMAN.)

The WITNESS.—I said I saw the accident to Albert Page in the Harlowton yards. I did not witness the killing. [111] I don't want the jury to understand that I saw the killing. I didn't take his question that way. As a matter of fact, I didn't see the killing.

Witness excused.

[**Testimony of Warrington Richards, for Plaintiff.**]

WARRINGTON RICHARDS, called as a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My occupation is that of an undertaker. On or about the morning of the fifth of November, 1912, I had occasion to go to the intersection of the Milwaukee and St. Paul railway tracks with Montana Street, near Greenwood Street, in the city of Butte. At that time I found the body of a person there. As near as I can remember the body was found about three hundred yards east of the Montana Street crossing of the Milwaukee road. The body was scattered from the crossing about three hundred yards east; at least that is where we found the wagon.

By the COURT.—The Court does not understand. Do you mean [112] that the crossing was three hundred feet east of the body?

A. No, all the way it was covered with body, the body was strewn and scattered all along on the tender and engine about three hundred yards west of the crossing; the train at the time was going west.

(By Mr. WHEELER.)

The WITNESS.—With reference to where the body was found, if I remember correctly—of course it is quite a while ago—but if I remember rightly the body was lying somewhere either under the engine or the first car back of the engine, I cannot exactly

(Testimony of Warrington Richards.)

recollect at the present time.

The condition of the body when I found it was in bad shape; it was badly damaged. I don't remember at the present time in what way it was mangled or how it was cut.

I don't remember now whether I testified at the coroner's inquest, or whether I had my assistant.

Q. Refreshing your memory, I will ask you if this question was not asked you at the time of the inquest on the 13th day of November, 1912: "Q. What condition was the body in," and didn't you answer: "A. Well, we found the top of the head from the bridge of the nose up completely crushed; in other words, it was severed right across and the left arm was cut off between the elbow and shoulder, and the left leg was cut off right at the knee; the right leg was cut off just above the shoe top and the remainder of [113] the foot left in the shoe. Outside of these injuries there was not a scratch on the body." Do you remember of so testifying?

A. I remember it now, yes.

Q. Was that the condition of the body as you found it? A. Yes, it was.

I got there to where the body was about a half an hour after the accident happened, I don't just remember the hour. I know it was dark—I remember that because we *met horse* that someone was driving at the time that I think had a broken leg, and we missed running into the horse with the machine by a narrow margin.

Q. I will ask you if you did not testify at the

(Testimony of Warrington Richards.)

coroner's inquest that it was about ninety feet, or [I will ask you if you were not asked this question and if you remember of making this answer: "Q. Was there any effects shown immediately upon the crossing, any obstructions or anything like that?" and you answered: "A. Well, when I examined it down there, Mr. Coroner, it looked to be about seventy-five feet, probably, or ninety feet from what is called the frogs of the track. We found a good deal of flesh and bone as though certain portions of the body had been crushed between the frogs where we found these brains and bones scattered on Montana street. There was no evidence of crushing by the wheels." Do you remember making that statement? [114]

A. I remember now that the wagon was scattered along in front of the engine and we found lots of milk scattered all over the engine; I remember of going down there about eight or nine o'clock, as soon as we could get turned back, to see if we couldn't find and pick up what we could not find when we got the body.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I am a busy man and my memory of this accident has been clouded by lapse of time and other business between that time and now. My memory was clearer at the time the accident upon these things and was clearer when I gave my testimony at the coroner's inquest than it is now.

Q. I will ask you if you remember this question

(Testimony of Warrington Richards.)

being put to you, I think, by the Coroner: "Q. Did you look to the east to see if there was any sign or token of the accident?" and you answered: "A. Yes, it was dark." A. Yes.

Q. And was this question asked you: "Q. Did you in the morning?" and your answer was: "A. Yes, at nine o'clock; there was nothing to show only where the body lay." "Q. That was seventy-five feet west of the crossing?" and then there is a——, and you are then asked: "Q. Did you measure the distance from the crossing to where you found the body?" and you answered: "A. No, sir." Do you [115] recollect of testifying to that?

A. Yes, sir.

My memory being refreshed I remember of saying that the top of the head from the bridge of the nose up was completely crushed. As I remember it now, it was right across from the top to the bridge of the nose. I remember saying that the left arm was cut off between the elbow and shoulder, and the left leg was cut off right at the knee, and that the right leg was cut off just above the shoe top and remainder of the foot was left in the shoe. I also remember of testifying that there were no further scratches on the body. That part of the body was clear.

(By the COURT.)

The WITNESS.—I presume I got notice of the injury by telephone. My place of business is possibly three-quarters of a mile or a mile from the scene of the accident, and I drove down with a rig. It was

(Testimony of Warrington Richards.)

dark at the time, we had lights on the machine, headlights. I said that we nearly ran into someone; there was a horse that was driven on a wagon that I thought had a broken leg at the time, I thought he had time to get out of the way, I didn't know at first that the horse was injured until we got up close to him and I saw he was unable to move. I spoke of the body being scattered along on the track. We found the brains and bones scattered along the rails. I mean by bones, bones of the body, limbs, legs and arms. [116]

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—We made an examination of the body after getting it to the undertaking parlor; we always do that.

Q. I will ask you, remember testifying at the coroner's inquest as follows: "Q. Who called you, Mr. Richards?" "A. We were called from the police station." "Q. Who made the identification of the body?" "A. If I am not mistaken Mr. Chappell telephoned me about nine o'clock in the morning." "Q. What time did you go down there?" "A. We were called at four-thirty and got down there just as fast as an automobile could take us there." "Q. Immediately after the accident?" "A. Yes."

(By the COURT.)

Q. To what extent were the brains removed from the cavity when you found the body?

A. As near as I can remember, the entire top of

(Testimony of Warrington Richards.)

the head was gone, that was inside, all the brains were scattered.

(By Mr. WHEELER.)

Q. The first part of the body that you found was about how far from the crossing, do you remember?

A. I don't remember now, I knew at the time I answered that question and I answered it to the best of my ability.

As I understood it the forks of the track were right [117] near the switch where the fork divides, and separates from the main line.

Q. I will ask you if you did not say this upon your examination before the coroner: "Well, when I examined it down there, Mr. Coroner, it looked to be about seventy-five feet, probably, or ninety feet *from* is called the frogs of the track." A. Yes, sir.

Q. That is where you found the first portion of the body, wasn't it? A. Yes, sir.

Witness excused.

[Testimony of E. S. Rainey, for Plaintiff.]

E. S. RAINEY, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My occupation is that of railroading, and have been employed in that line of work for about nine years as locomotive fireman, and locomotive engineer, having worked for the Northern Pacific and Great Northern Railroad [118] companies. My experience in railroading has been in Montana, I was employed on the Rocky Mountain

(Testimony of E. S. Rainey.)

Division of the Northern Pacific, which is west of Butte. As such engineer I have had occasion to stop and start trains, and I have had occasion to stop them by throwing the emergency brake on.

Q. I will ask you this question, Mr. Rainey: Assuming that an engine weighing, approximately, sixty tons was backing up and drawing twelve cars, twelve gondalo cars, loaded with coal and coke over a grade of one-half of one per cent and going at the rate of six miles an hour, where the cars were connected with the air, and the air was also connected with the engine, and assuming that the braking power was in good condition, in what distance could you stop a train under such circumstances by applying the emergency application?

Mr. FURMAN.—This is objected to for the reason that the hypothetical question does not contain sufficient of the essential elements to enable the witness to answer intelligently and fairly, and does not contain sufficient of the conditions to enable this question to be answered at all.

The COURT.—I think it sets out a situation which he could fairly answer. The objection is overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. About thirty feet, I should say. [119]

Cross-examination.

By Mr. FURMAN.—Q. If, in addition to the facts as stated by Mr. Wheeler on this particular morning the rail was frosty, and cold, and if in addition to

(Testimony of E. S. Rainey.)

that the grade was steeper than was stated in the question, would that increase or decrease the distance in which the train could be brought to a stop?

A. Yes, sir.

Q. Now, supposing, in addition to that that a short while prior to making the emergency application, I mean immediately prior to that, there had been a slight service application of from seven to ten pounds, and then that had been released, and then before the reservoirs were recharged, and while the air line was overcharged, then the emergency application was made, wouldn't that increase the distance he would go before he could stop?

A. It would slightly increase it.

Witness excused.

Plaintiff rests. [120]

[Testimony of J. E. Woods, for Defendants.]

J. E. WOODS, a witness called on behalf of the defendants, after being duly sworn, testified as follows:

(By Mr. FURMAN.)

The WITNESS.—My full name is J. E. Woods and my occupation is that of locomotive engineer and employed by the Chicago, Milwaukee and St. Paul Railway Company, and on the fifth day of November, 1912, I was employed by that company in the Butte yards as locomotive engineer on engine No. 1163. That engine is what is commonly known and termed as a switch-engine, belonging to the switch service.

On the morning of this accident we were pulling twelve loaded cars of coal and coke, merchandise and

(Testimony of J. E. Woods.)

stock. That train was made up in the Butte yards, about a quarter of a mile from the crossing at Montana Street. With reference to our destination on that morning we were about to transfer this stock to the B. A. & P. yard. The fireman that I had with me on that morning was a fellow by the name of Byers. He is dead now, I understand.

Q. I just want you to describe a little bit about the switch-engine you were using, 1163, how is that constructed?

A. It is constructed with footboards on both ends and on the rear end it has what is called a sliding tender, and it has two kerosene lights, one on each end.

It does not make any practical difference which way that engine is going, backing or going ahead, not in regard [121] to the lights anyway. On this particular morning at the time of the accident the engine was backing up, and going west. I was on the south side of the engine.

Q. Did you see Mr. Chappell immediately prior to the accident?

A. I saw Mr. Chappell when he gave the sign to leave the yard; the next time I saw Mr. Chappell was when he jumped off the footboard.

This was near the Montana Street crossing. He jumped off on my side of the engine. The reason why I was on the south side of the engine when I was going west was because the engine was backing up.

Q. Now, will you state at what rate of speed your

(Testimony of J. E. Woods.)

engine was running, and your train was going, at a point we will say, four or five hundred feet east of the crossing, and before you came in sight of the wagon?

A. Eight miles an hour, I should judge.

I had made an application of the brakes, and had it released just prior to coming in sight of the team. With reference to the number of pounds of pressure, I should judge it was from seven to ten pounds application.

Q. State whether or not that application had been released before you used the brake and came in sight of the team?

A. Just prior to that, just a few seconds.

I should judge I was about two hundred feet east of the crossing at the time I first saw the rig, but they [122] claim, according to measurements, it was about three hundred feet.

Q. At that point, two hundred or two hundred fifty feet, or from a hundred and fifty to two hundred feet, state whether you saw or heard the signal from your switchman on that morning.

A. No, sir; no signal at all.

I watched this rig from the time it first came into my sight. I would estimate that the rig was a hundred and seventy feet, or something like that, from the crossing at the time I first saw it. I should judge the team was going about five miles an hour. I didn't notice any symptoms of nervousness on the part of the team at all. I did not notice the lines on the horses' back until we got up to them, when

(Testimony of J. E. Woods.)

they were slack, just as near as I could see when I got up under the rays of the arclight. The point, with reference to the crossing, where I saw Mr. Chapell get off, I should judge was about ten feet from the crossing, or a little more, maybe.

With reference to whether I made any further application of air on this morning, when I saw that there was a possibility that the driver would not stop his team, why I threw the brake valve into the emergency; I got the emergency into position about seventy-five feet from the crossing. We hit the wagon after that. There was no precaution that I could have taken which would have enabled [123] me to stop the train in any less distance than I did actually stop it from the time I put on the emergency brake. I did not see the boy at any time at all before the accident. So far as I saw, there was no indication that there was any driver in the rig at all. The rig was about a hundred and twenty feet, or a little more, from the track at the time I thought that there would be an accident. The rig was that far away. At that time I made an emergency application. I had twelve cars on the train that night. The weight of the train that morning, I should judge, would be about seven hundred tons. I blew the whistle of the engine on that morning about three hundred feet east of the crossing one long and two short blasts of the whistle. There is no way to hold down, modify, soften, or diminish the noise that is made by the whistle on that locomotive. The bell was ringing at the time

(Testimony of J. E. Woods.)

I blew the whistle, and was ringing at the time of the emergency application, and the bell was ringing at the time the accident happened at the crossing.

Q. State whether or not there was any other noise, coming from any application on the locomotive at that time.

A. We had what you term a blower on the engine.

Q. What is the effect of that?

A. It makes quite a bit of noise.

This was in operation during the time I have testified about. You could hear that noise anyway a quarter of a [124] mile.

With reference to the atmospheric condition that morning, it was frosty. There was no wind, or blowing, it was a quiet morning. The accident happened about four o'clock in the morning. The rails were frosty on this morning. The rails were frosty at the crossing, and were for a hundred feet distance west of the crossing and for three hundred feet east of the crossing. The braking apparatus on that morning was in good condition.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—As a servant of the company, I am required to know the rules of the company. I am acquainted with the rule which provide that the whistle shall be sounded one-half mile from stations, railway crossing, drawbridges and junctions, also eighty rods from highway crossings, and that the bell shall be rung and kept ringing until the crossing is passed. I am familiar with that rule. I blew

(Testimony of J. E. Woods.)

this whistle on this morning in accordance with that rule. I said that I blew the whistle three hundred feet away from the crossing; that was the second time I blew it.

I have been employed as an engineer since 1909.

Q. What were you employed at prior to that time?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial. [125]

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Why, I was employed as an engineer, wiper, fireman, engine dispatcher and engineer.

I have been employed on the B. A. & P. and on the Chicago, Milwaukee and St. Paul railroad. I had been employed by the Milwaukee prior to the time this accident took place, since August 20, 1912.

I testified at the coroner's inquest. When I first saw this team coming, I should judge I was about two hundred feet distant from the crossing. I don't remember that I testified at the coroner's inquest that I should judge I was about three hundred feet from the crossing.

Q. I will ask you if this question was asked you by the coroner at the coroner's inquest held on the 13th day of November, 1912: "Q. When you crossed Montana Street that morning on the crossing, when did you get an intimation, or when did you get the first intimation that there was a team here?" "A. Oh, when I could see it about three hundred feet

(Testimony of J. E. Woods.)

away was the first intimation I could see of it." Did you so testify?

A. That must be right; then I remembered it better than I do now.

I was three hundred feet away from the crossing when I saw the team coming. When I saw the team, it was [126] about a hundred and seventy feet from the crossing. The team had just driven up past the back of that house there. I saw the team plainly from the time I first got past the house until it struck the track. I watched it all the time. I noticed that there was no efforts made by the person driving the team from the time I saw until I struck it. I didn't see any effort made on the part of the driver to get out of the way.

I also saw Mr. Chappell get on the rear end of the engine on the footboard when we left the yards, and I didn't see him at any time after that until he jumped off. The rear footboard of that engine is pretty close to the tender; it is right at the rear end of the tender. You could not see a person when he is standing on the rear footboard, unless he is leaning out over the side; couldn't see him from where I was in the cab. I don't know that this is what is commonly called a fan tail tender. It is a sliding tender, sliding down to the front, and the height of the tender is eight or ten feet, I should judge.

Q. Where is the top of the tender with reference to where your head would be when you would be sitting in the cab window?

A. I could look right over the top of the tender.

(Testimony of J. E. Woods.)

The tender gradually slides down until it reaches a [127] height of five or six feet.

I said that when I got a distance of about seventy-five feet from the crossing I put on the emergency brake.

Q. What have you to say with reference to whether or not you used any sand, or whether there was any sand on the engine that morning?

Mr. FURMAN.—I object to this for the reason that there is no defective appliance *complained on* the part of the plaintiff, and no negligence in not applying sand upon the tracks, and no defects in the appliances on the engine.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. There was sand on the engine.

Q. Was there any sand put on the track by you?

Mr. FURMAN.—This is objected to for the reason that they are seeking now to establish a different kind of negligence than they allege in their complaint.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Mr. FURMAN.—I object to it further as not proper cross-examination.

Objection overruled.

To which ruling of the Court counsel for the defendants [128] asked for and was allowed an exception.

(Testimony of J. E. Woods.)

A. There was not; but it would not have done any good that night, or that time, on account of being on a curve and the air pressure from the sand-pipes would have thrown the sand to one side, and outside the rail. There was no sand put on the track by me.

It would not have done any good, and would not have added to the braking power to put sand on the track. I said that I put on a slight application of air. I can't tell you at what distance from the crossing I put on that slight application; I don't remember that now. I remember the distance at which I put on the emergency, however.

Q. How long a time was it from the time you put on that slight application, and then released it, until the time you put on the emergency?

Mr. FURMAN.—I object to this as incompetent and immaterial; he says he can't testify where he made the application.

By the COURT.—I think you are asking how long it was after he put on the service application before he put on the emergency. Your best estimate, Mr. Woods, is all that is asked for. The objection is overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. I would say four or five hundred feet, I think, we ran.

Witness excused. [129]

Mr. WHEELER.—If it is satisfactory to the Court, I would like to call Mr. W. D. Fenner as a witness on behalf of the plaintiff at this time. He

(Testimony of J. E. Woods.)

was not here when we closed our case and I *would* *permission* of the Court to put him on the stand.

The COURT.—You may call him if you wish.

[Testimony of W. D. Fenner, for Plaintiff.]

W. D. FENNER, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

(By Mr. WHEELER.)

The WITNESS.—My name is W. D. Fenner, and am District Manager of the Equitable Life Insurance Company. I can tell the expectation of a man's life, as given by the table of expectancies of the insurance company, and of a person fifteen years of age. It would be forty-five and five-tenths, in other words, forty-five and a half years.

I can tell you how much money would be required to purchase for a person twenty-one years of age an annual income for life of one hundred dollars per annum. The cash that he would pay in would be two thousand three hundred and twenty-six dollars and twenty cents. It would cost a person twenty-one years of age to get an annual income of nine hundred dollars every year, \$27,914.20.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I am not testifying from my own knowledge, [130] but from a table given to me by my company and has been acted upon since 1859. My company shows the probabilities of life of a person fifteen years of age, forty-five and five-tenths years. That takes into consideration the

(Testimony of W. D. Fenner.)

physical conditions of the average person. That is an average. My company would not attempt to guarantee that any particular individual will live that length of time; not at all. I said that the costs of an annuity of one hundred dollars would be \$2,326.20, to procure an annuity of one hundred dollars a year. That is of a person twenty-one years of age. I imagine that that would be less than five per cent on the money paid in. These figures that I have given you do not include other things such as the items for my own service, agent's salary, or commission, or anything like that. There is no commission paid to anybody on the purchase on an annuity except to the person writing it. The District Manager gets nothing, and none of the other officers of the company get anything on an annuity, not to my knowledge, and I have reference to my own contract. I have agents working on these. If they sell an annuity I get no commission at all. I get no commission on an annuity at any time. I suppose the insurance companies do business for a profit, and it is done like other business of corporations. It is naturally run for profit. Upon every policy sold, and every annuity sold, there is an arrangement by which the insurance society will [131] get a profit out of it. Naturally their investment will have to make an income. The insurance companies get a profit out of every policy sold, and I presume it is so figured that they get a profit out of every annuity sold. I imagine that if they do not get a profit

(Testimony of W. D. Fenner.)

it is due to a mistake somewhere. The insurance companies do business on a profit basis.

Witness excused.

[**Testimony of J. A. Woods, for Defendants (Recalled
—Cross-examination).**]

J. A. WOODS, recalled for further cross-examination.

(By Mr. WHEELER.)

The WITNESS.—At the time I put on the emergency brake I was a distance of about seventy-five feet from the crossing. I believe that is what I testified to when I was on the stand before. That is correct, as near as I can remember. I can't say whether at that point the track is practically straight for a distance of twenty-five feet east of the crossing of the street line. I am not sure about that; I can't say whether it is or not. I said that the reason I didn't use sand was because I was on a curve; I also said that it *would have* had any effect on that curve.
[132]

Q. When you were on that crossing, and from the crossing running west was absolutely a straight track, was it not?

Mr. FURMAN.—This is objected to as calling for a conclusion.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. It was straight as far as I know—I would not swear whether it was straight or not, but I believe it is.

(Testimony of J. A. Woods.)

The team and the boy and the wagon were carried in front of the engine about two hundred feet; that is from the point of contact. I did not use any sand from the time I struck the team until I stopped.

Q. What are the rules of the company, Mr. Woods, with reference to the conductor who stands upon the front end, or the rear end, of the train—the one we are talking about—with reference to giving any signals in case he should see anything on the track?

Mr. FURMAN.—I object to this as incompetent, and for the reason that the witness is not qualified to speak with reference to conductors' business, and upon the further ground that the best evidence is not being called for.

The COURT.—If this man knows, he may answer.

To which ruling of the Court counsel for [133] defendants asked for and was allowed an exception.

A. Well, I don't know anything about conductors' business, the conductor's part of it.

Q. Well, you are supposed, as an employee of the company, to know the rules of the company?

Mr. FURMAN.—This is objected to as calling for the conclusion of the witness.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. The only thing I know of, when there is any danger of anything happening he is supposed to give a special signal.

I said on this occasion he never gave any signal,

(Testimony of J. A. Woods.)

unless he gave me a signal when he jumped off then I went back to the rear end. That was the only time he ever gave me any signal. I was watching for him all the time; I could see him all the time, that is if he had been where he should have been giving a signal. He was where he should have been when he was on the southwest corner of the engine, but he was not out on the side where I could see him. My head, when I am sitting in the cab window, is approximately a couple of feet above the tender. We went about two hundred feet after putting on the first application of air, maybe more. I can't say how long it took us to go [134] that two hundred feet, but it took us a certain number of seconds. I can't approximate the number of seconds.

The purpose of putting on the application was to slow up for the curve and the crossing. I put on from seven to ten pounds of air pressure and kept it on for a distance of about two hundred feet.

Q. Now, as a matter of fact, if you put on ten pounds of air pressure and you kept it on for two hundred feet, wouldn't it stop the engine, or train, going at the rate of six miles an hour?

A. We were going faster, probably a little faster than six miles an hour at that time.

I believe I stated that we were going about eight miles an hour. It is not a fact, if we were going at a rate of eight miles an hour, and I applied ten pounds air pressure, that it would have stopped the train in going a distance of two hundred feet. I don't think it would stop it. I am not an expert

(Testimony of J. A. Woods.)

on that matter. I am an engineer; I can't tell you whether it would nor not. When we want to stop the train, I should judge we would put on from fifteen to twenty pounds of air at a time. When we want to make an emergency stop we would put on more air than that. We would put on all we could get in, and you can draw from seventy to a hundred pounds. If you put on twenty pounds of air, going at a speed of six miles an [135] hour, or eight miles an hour, I couldn't state exactly in what distance the train could be stopped.

I will ask you in what distance, assuming that you were going at the rate of eight miles an hour over a grade of one half of one per cent, with the engine you had and in question here, the engine being in good condition, and the braking-power in good condition, the air attached to all the cars, the engine drawing about seven hundred and fifty tons, and supposing you put on the emergency, and you used every means at your control to stop it, at what distance could you stop that train?

Mr. FURMAN.—I object to this question for the reason that it does not include all the testimony of this and other witnesses with reference to the use of air for a distance before the emergency would be necessary. I believe that the evidence shows that there were ten pounds of air used for a distance of two hundred feet and then released; and there is nothing said in the question as to its braking power prior to the application of this air and the braking power after the use of ten pounds and its release. I

(Testimony of J. A. Woods.)

object to the question as incompetent, irrelevant and immaterial, also.

Objection overruled.

To which ruling of the Court counsel for [136] defendants asked for and was allowed an exception.

A. It ought to be stopped in eighty or two hundred feet, anyway.

I can't say whether it would be nearer eighty than two hundred feet. It would be my judgment of it; it is just my judgment about it, eighty to two hundred feet. That is the nearest I would approximate it. I first put on the emergency brake about seventy-five feet from the crossing.

I remember of testifying at the coroner's inquest before a jury on the 13th day of November, 1912.

Q. And do you remember that at that time I asked you this question: "Q. Whereabouts were you when you first put on the emergency brake?" and you answered: "A. I should judge one hundred and fifty feet east of the crossing." Did you make that statement? A. Not that I know of.

Q. You would remember if you did make it?

A. Yes, sir.

Q. I will show you this statement, and I will ask you to examine this portion here (indicating) and ask you whether or not you made that answer?

A. I guess that is the way I made it; it is in there.

When you put on air and release it, after having put it on, there is a little noise made by the escaping process. It is not very loud, you can't hear it very [137] far, just a few feet from the car.

(Testimony of J. A. Woods.)

Q. Would a person be able to hear it, provided he was sitting on the rear end of the engine—I will ask you if a person who was sitting on the end of the car on the retainer here (indicating) would be able to hear it?

Mr. FURMAN.—This is objected to as calling for the conclusion of the witness.

Objection overruled.

To which ruling of the Court counsel for the defendants asked for and was allowed an exception.

A. He might if the cars were not rattling, but if the cars were rattling he would not hear it.

I believe the retainers are on the same end of the car that the brakes are on. At the point of contact, or at the place where the accident happened, the train was going at about six miles an hour.

Q. Now, after refreshing your memory as to what you testified to at the coroner's inquest, would you say now that you put on the emergency brake a hundred and fifty feet east of the crossing, or seventy-five feet?

A. I should judge now, about seventy-five feet, as far as I can remember.

Q. You say that the testimony you gave at the coroner's inquest was incorrect?

A. I may have heard a little wrong and got out of the [138] way at the time.

Q. That was closer to the time that the accident took place than now? A. I guess it was.

Mr. FURMAN.—I object to this line of examination as purely argumentative, and I move to strike

(Testimony of J. A. Woods.)

the answer out for that reason.

Motion overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Q. What has occurred since that time to refresh your memory with reference to the time you applied the emergency brake?

Mr. FURMAN.—I object to this for same reason.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Nothing that I know of.

Q. Never talked to the claim agent of the road about it?

Mr. FURMAN.—I object to this for same reason.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Never talked to anybody about this matter, only I had a consultation with the lawyer about these matters. [139] I talked it over with the attorneys for the defendants.

Redirect Examination.

(By Mr. FURMAN.)

The WITNESS.—My attention was never called to the testimony I gave before the coroners at the inquest and I was never given an opportunity to read over the transcript of the testimony, either by the coroner or by his stenographer, or anyone else. I have no independent recollection at this time as to what my testimony was, except from this page of tes-

(Testimony of J. A. Woods.)

timony to which my attention has been called. I never saw that before. I have no reason to believe that I testified I put on the emergency brake a hundred and fifty feet east of the crossing, except from this printed page of testimony. That is all.

I had not worked as an engineer for the company prior to the time I started to work for the Milwaukee & St. Paul Railway Company. I started in for the Milwaukee as a boiler-maker and worked at that for about a month and then I went to work engine ——— for two or three months, and from that I hired out as an engineer for the Milwaukee.

Q. Did you ever work for anybody else?

A. Yes, for the Butte, Anaconda & Pacific.

Recross-examination. [140]

(By Mr. WHEELER.)

The WITNESS.—I have worked as an engineer before I went to work for the Milwaukee. Worked since 1909.

I testified as to the tracks being frosty on that morning. When I got down out of the engine I could see the frost when we walked around there. I did not make any particular observation of that, that is to make a particular examination,—I didn't get right down and examine the tracks, but I looked and I could see it just as you would at anything else, and I saw frost. There had been no other trains go over the track that morning before we did that I know of. I don't know whether there had or not.

Witness excused.

[Testimony of Frank L. Reily, for Defendants.]

FRANK L. REILY, a witness called on behalf of the defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—I am the official court stenographer of Department Two of the District Court of Silver Bow County, Montana, and was acting in that capacity during the trial of the case of James B. Glover vs. [141] Chicago, Milwaukee & St. Paul Railway Company on the 24th day of March, 1914, and took down the notes of the testimony of the witnesses given at that trial. I have my shorthand notes of the testimony of the witness M. I. Chappell taken at that time.

Q. I desire to refer you to your notes, and the portion I wish to call your attention to particularly is found on page 22 of the transcript, and I will ask you if you can tell from your notes whether or not the witness Chappell was asked by counsel for the defendant Company this question: “Q. Now, I will ask you whether there was any other sound coming from the engines on that morning?”

A. Yes, sir.

Q. And his answer was, “A. Why, the exhaust from the pump.”

A. Yes, sir.

“Q. What sort of a noise was that?” “A. That is a steam going off. It makes a noise that can be heard for a considerable distance; probably, if it was

(Testimony of Frank L. Reily.)

quiet and everything was still, it could be heard for a half a mile." Was that question asked and was that answer given?

A. Yes, sir.

"Q. As a matter of fact, it could be heard from the roundhouse up to the Montana Street crossing on a still morning?" "A. Oh, I wouldn't say that far, unless it [142] was clear and still." Was that question asked and did he make that answer?

A. Yes, sir.

"Q. On this particular morning, what was the condition of the atmosphere and weather?" "A. It was clear and not storming or anything I could mention, to speak of." Was he asked that question and did he make the answer I have read?

A. Yes, sir.

Q. Was this question asked him? "Q. Clear, crisp fall morning?" "A. Yes, sir."

A. Yes, sir.

"Q. How far would you say that the exhaust could be heard on this particular morning? Of course, that's purely an estimate?" "A. Oh, I imagine, to be safe, it could be heard at least a quarter of a mile." Was that question asked and that answer made?

A. Yes, sir.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I have no independent recollection of the testimony given at that time, outside of my notes. None whatever. I know that oftentimes

(Testimony of Frank L. Reily.)

stenographers make mistakes in their notes; we are not infallible. It is quite true, when there is noise in the courtroom, or when someone coughs, or if the [143] witness is indistinct a stenographer is liable to make a mistake and not catch the answer or question accurately.

(By Mr. FURMAN.)

The WITNESS.—I took the notes in the regular discharge of my duty as official court stenographer. I cannot discern from my notes any indication of disturbance in the courtroom, or any failure on my part to understand the questions or answers.

(By Mr. WHEELER.)

The WITNESS.—If there was any disturbance in the courtroom or any coughing, or anything of that kind, it would not appear in my notes, but if I can't hear I generally ask the witness to repeat, and if he does not repeat, I generally have in my notes "can't hear." That is the way I generally do it.

Witness excused.

[Testimony of Charles H. Little, for Defendants.]

CHARLES H. LITTLE, called as a witness, after being duly sworn, on behalf of the defendants, testified as follows:

Direct Examination.

(by Mr. FURMAN.)

The WITNESS.—I am occupying the official position of Official Court Stenographer of Department 3 of the District Court of Silver Bow County, Montana. [144] I am also a Notary Public. I was

(Testimony of Charles H. Little.)

present at the time of the taking of the deposition of M. I. Chappell in a case wherein David Clement was plaintiff and the Chicago, Milwaukee & Puget Sound Railway Company et al. were defendants. The deposition was given before me as Notary Public. I have no knowledge as to what became of the original transcript of the deposition. I have my notes of the testimony given at that time. I have them with me. This instrument which you show me is a carbon copy of the original transcript of my shorthand notes of the deposition, and is a true copy. I have made a comparison of that transcript of the deposition with my notes and it is correct.

Mr. FURMAN.—I will read such parts of this as I desire to go in the record at this time, with the Court's permission.

The COURT.—He says he has made a comparison. You may read it into the record.

Mr. FURMAN.—I will read from page 19.

“Q. Were there any signs of life in the body at the time that you saw it first?” “A. I couldn't tell.”

“Q. You didn't make an examination of it close enough to tell whether or not there was any—” “A. No, I did not.” “Q. —breathing or anything of the kind?” “A. No, sir.” “Q. Was any move made by the boy after you saw him?” “A. Not that I could see.” [145] “Q. Not that you could see?” “A. No.” “Q. And how long after you struck the wagon was it before you saw the body?” “A. Possibly a minute, maybe a little more.” “Q. Could

(Testimony of Charles H. Little.)

you tell whether or not the boy was breathing any at that time?" "A. No, I could not." "Q. What is your best judgment in the matter, with reference to whether or not there was still any life in the body?"

"Mr. FURMAN: We object on the ground it is repetition, calls for a conclusion. Testify to what you know." "Q. Answer the question, what is your best judgment in the matter?"

"A. Well, I couldn't say, the body was in such a condition that I couldn't take hold of it."

Q. That was the testimony given by Mr. Chappell before you as Notary Public and transcribed by you?

A. Yes, sir.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I have no independent recollection of the testimony given by Mr. Chappell, outside of the notes I made. It is very often the case that a stenographer will make a mistake in transcribing his notes; but this deposition was read over to the witness by the notary before he signed it. It was read over to him and he swore to it before me as a notary public, and he swore that it was true and correct.

Witness excused. [146]

[**Testimony of Ray Webb, for Defendants.**]

RAY WEBB, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—I am with the Claim Department of the Chicago, Milwaukee & St. Paul Railway Company, and was so employed on the 6th day of November, 1912. I recognize the instrument which you show me, which is typewritten, as a statement I got from Mr. M. I. Chappell, Mr. M. I. Chappell gave me the information contained on that typewritten page the next day after the accident, on the 6th day of November, 1912, in the Freight Depot of the Chicago, Milwaukee & St. Paul Railway Company, in Butte.

Q. I will ask you to state whether or not at that time and place, Mr. M. I. Chappell made this statement to you: “Q. Clement was badly cut and bruised and was dead when we got to him.”

A. Yes, sir, he did.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I am the Claim Agent of the Chicago, Milwaukee & St. Paul Railway Company, and as such my duties are to get statements from employees and every [147] person who knew any thing about the injury immediately after the accident takes place. To the best of my knowledge this statement was made to me about eight o'clock in the morn-

(Testimony of Ray Webb.)

ing, right after Mr. Chappell came off duty. The statement was made in the Freight Depot of the Chicago, Milwaukee & St. Paul Railway Company. I don't remember who was present when the statement was made; I know Mr. McCann was the agent. I wrote the statement up right in the depot. I wrote it out on the machine myself. Mr. Chappell gave me the facts and I copied them down and handed them to him and he read them over and he signed them. This was around eight o'clock in the morning the day after the accident happened; it was right after he came off duty in the morning.

Q. Isn't it a fact that at the time this statement was made Mr. Chappell was on duty with the Milwaukee?

A. He was working for the Milwaukee, but he was working night shift, and it was after he came off shift in the morning that he came up to the depot in the morning and gave me this statement.

This statement was not given me before he came off shift. Neither was it made earlier in the morning, I don't know what time Mr. Chappell got off shift, but I told him to come up after he got through with his work, and he did come up. I don't know when he came [148] off shift.

Q. You say in this statement that the "engine bell was ringing." Nothing was said at that time with reference to when it was ringing, and there is nothing in this statement to show at what point this bell was ringing?

A. I don't remember whether there was anything

(Testimony of Ray Webb.)

in that statement or not. My object was to find out whether the bell was ringing at the time, and I took it from what he said that it was; that was my understanding of it.

I did not make notes of what he said and then write them out on the machine. The statement he made to me was, that the bell was ringing.

Q. But he didn't say that the bell was ringing at the crossing of Montana street, or at what point the bell was actually rung?

A. It says here: "Engineer sounded the regular crossing whistle, engine bell was ringing."

Witness excused. [149]

[Testimony of John Geach, for Defendants.]

JOHN GEACH, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—My business is that of locomotive engineer, and am employed by the Butte, Anaconda & Pacific Railway Company. I have been employed in the capacity of engineer about eleven years.

I have given the question of speed, air brakes and apparatus on a locomotive, or engine, some special attention and study. From a practical standpoint, I have, and have given it some theoretical study. I have had occasion at different times to observe within what distance, under stated conditions a train of a given weight may be brought to a stop. I understand something about coefficient friction. Coefficient

(Testimony of John Geach.)

friction would be to take the ratio of resistance of two pieces sliding over each other, the calculation of the amount of pressure it would have forcing them together. The coefficient friction is the greatest on slow speed.

Coefficient friction can be great enough at slow speed upon a frosty rail to entirely destroy the braking power on an engine, or car, so as to slide the wheels. From that question you have asked we have got [150] to infer and take the circumstances into consideration mentioned in your question. We have got the ratio of the adhesion between the wheel and the rail, and the ratio of adhesion is taken from this point, that is one-fourth of the total weight resting on the wheel and the rail. Now, then, from that point we will take the point of a frosty rail. It runs from one-fourth to one-fifth, one-sixth to nearly one-seventh of the ratio of adhesion; that would bring our point of adhesion down to really below the pressure of the brake-shoe on the wheel; this pressure of the brake-shoe on the wheel would be less than the adhesion between the wheel and the rail, and the consequences are when it is greater the wheel will slide, and nothing can prevent it. This has been tested out on the larger railroads of the country by means of the dynamometer machines that actually require the movement of the wheel on the rail with a braking power under these conditions.

Q. I will ask you to explain to the jury just the means by which brakes are applied through the agency of air brakes on an engine or train?

(Testimony of John Geach.)

A. First, we must consider that the air brake system is charged to a certain pressure, and that pressure, as soon as in that brake-pipe on the train line under the train, or cars, it leads to what is [151] termed an auxiliary reservoir under the cars, and in order to stop you have got to reduce the pressure in the brake-pipe. As soon as that is done, why the brake begins to immediately apply to the amount of pressure that is exerted on the opposite side of the triple piston, and as soon as that is worked out the pressure will fall from the auxiliary reservoir into the brake-cylinder.

(By Mr. WHEELER.)

Q. As I understand it, the auxiliary reservoir must be charged before the air will be in a position where it can be applied? A. Yes, sir.

Q. What is the pressure with which the auxiliary reservoir is charged?

A. The standard pressure is seventy pounds.

(By Mr. FURMAN.)

Q. In what time can the auxiliary reservoir be charged from an atmospheric pressure to a pressure of seventy pounds?

A. We usually take about eighty seconds.

Q. Is the air put into this auxiliary reservoir uniformly?

A. Well, from a certain standpoint it is, and another it is not. You will infer from my answer that it is, yes. That as the air brake system is charged we [152] put our brake-valve in full release position and we leave it there for a time being, that is,

(Testimony of John Geach.)

until the entire reservoir is charged, that is the auxiliary reservoir. Now, the auxiliary reservoir cannot be charged, in the same time that the train-pipe can be charged, due to the restricted flow of air to the auxiliary reservoir through the medium of a feed groove in the triple piston. This feed groove is made necessarily small to prevent the brakes on the head end of a train of over five cars charging all of the cars behind these five cars. If this were not so, the cars on the head end would become charged to an unnecessary high pressure, and the cars behind these five cars would receive little or no pressure, for the time being. This makes the uniform recharging of trains, or cars, more equal.

Q. I will ask you whether or not there is any practical difference in the time in which cars may be charged, up to the number of four or five, if four or five cars can be charged in practically the same length of time as one?

A. Yes, up to about five cars. Yes, it would be very materially, depending upon how soon after releasing the brake is reapplied, as there is a time limit we must consider in which the system can be recharged.

Q. Well, as I understand your testimony, when there has [153] been a service application of from seven to ten pounds run down the brake-pipes of air pressure, that air immediately after the service application has been released,—would it have any effect upon the reapplying of the brakes?

A. Yes. The reason for this restricted recharge is

(Testimony of John Geach.)

due, to the small feed groove by the triple piston through which the air in the brake-pipe must necessarily pass in order to charge the auxiliary reservoir.

Q. Now, just assume this condition: Assume that there has been a service application of air of from seven to ten pounds, which has been continued for a little space, sufficient for it to begin to take, and then it is released, and then, thereafter, in a very short while, there is an emergency application. Now, what have you to say as to the braking capacity of the apparatus under conditions like I have mentioned?

A. Under those conditions, we have got to consider, first, that we have put this air into the brake-pipe under the cars. As I stated before, that brake-pipe will actually overcharge itself without the auxiliary reservoir being charged. Now, if we make what we term an application, we must release that pressure in the brake-pipe before the brakes can be recharged and begin to be applied. As I said before, this restricted recharge is necessary because of the small [154] feed groove by the triple piston.

Q. I will ask you this question: We will assume that there is a freight-engine, or switch-engine, of from fifty to sixty tons weight drawing a train of twelve cars loaded with coal and coke of an estimated weight of seven hundred and fifty tons; the switch-engine is running backwards drawing this train, it is going down a grade of 75/100 of one per cent. upon a curve, at four o'clock on a cold frosty morning in the month of November, and the rail is frosty,—cov-

(Testimony of John Geach.)

ered with frost,—at a distance of several hundred feet east of a specified crossing there is a service application of from seven to ten pounds, now, that service application has been continued for a space of a few hundred feet, one or two hundred feet, or something like that, possibly a little more, the service application has been released, and then after the train has gone farther on,—a few seconds—traveled perhaps one hundred feet, or a hundred and fifty feet, to a point seventy-five feet east of that specified crossing, where there is an emergency application made; at that time the train is going at a rate of speed of probably six miles per hour. In what distance will you say, and in view of all the circumstances and conditions I have related in this question, that train should be brought to a stop,—under those conditions? [155]

A. If I stopped it within one hundred feet, I think I would be doing a pretty good braking job. But under the conditions as stated, being a frosty rail, where the ratio of adhesion is almost entirely destroyed, we can infer only one thing from it. Where the ratio of adhesion is nearly, if not quite, entirely destroyed, there would be a case of wheel sliding, and the train would slide until the wheels were flattened sufficiently to produce friction enough between the wheel and the rail until the train would stop of its own accord.

Q. What effect would it have on a grade, instead of being one-half of one per cent, but seventy-five one-hundredths per cent.

(Testimony of John Geach.)

A. In that case it would be practically nominal; the point would be so technical in order to figure it out it would be rather a difficult mathematical problem; to see what the difference of twenty-five hundredths of one per cent would be would be a problem. The difference would be very little in the case of a wheel sliding over a difference of twenty-five hundredths of one per cent in the grade.

I am familiar with the braking apparatus of a Gondola car. The Gondolas really have no different braking apparatus than any other car, any more than as a general rule we take them from a practical standpoint, whether loaded heavier than other cars. Roughly, the [156] weight of an empty Gondola is a little over forty thousand pounds. The capacity of a Gondola, as it is stenciled on the outside, is a hundred thousand pounds.

Q. If a Gondola weighs forty thousand pounds, empty, and the braking capacity of that Gondola is seventy per cent, is the braking capacity of the Gondola increased in any manner by loading it?

A. Not to my knowledge.

Q. How many thousand pounds can be applied on the brakes of a loaded Gondola, the load being one hundred thousand pounds, the load itself being forty thousand pounds?

A. Figures will show; the first thing we have to do is to find the percentage of one hundred and forty thousand pounds, which is twenty per cent of the braking power.

Q. So the braking power of a loaded Gondola is

(Testimony of John Geach.)

twenty per cent, whereas on an empty Gondola it is seventy per cent? A. Yes, sir.

A loaded Gondola going at the rate of six miles per hour, in my way of working, cannot be stopped with the same braking power, and in the same distance, as can an empty Gondola.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—These Gondolas are marked on the [157] outside as having a capacity of a hundred thousand pounds. I have no knowledge of what these cars were loaded with on this particular morning, except what has been said here in this case. I don't know whether it was twenty thousand pounds, fifty thousand pounds or a hundred thousand pounds. I don't presume to tell this jury what the braking power would be upon these particular cars, unless they are loaded to a capacity of a hundred thousand pounds.

I testified in the case of James B. Glover vs. Chicago, Milwaukee & St. Paul Railway Company.

Q. You were asked the question, were you not, with reference to what distance you could stop this particular train going at the rate of six miles per hour on a grade of one-half of one per cent, on a frosty rail, and you testified, did you not, at that time, you could stop it within a distance of forty feet?

A. No, sir, the remark I made at that time was, I would not like to get below forty-five feet. I would not go below that.

(Testimony of John Geach.)

While I have been engaged in the railroad business, it has been mostly on the Montana grades. I never made the statement that if I went beyond forty-five feet in making such a stop, going at that rate of speed, I would be constantly killing people.
[158]

If you put on application of say ten pounds of air on an engine, and you went two hundred feet, and you are going at the rate of eight miles an hour at the time you put on that application, the effect it would have upon the train would depend upon the braking power that has been developed. If you were going at the rate of eight miles an hour, on a grade of one-half of one per cent and you had twelve cars and an engine the same as has been described to me here in this case, the effect that it would have upon the question of slackening the speed, and how much it would slacken it, all depends upon the conditions. I have had a little experience as an engineer.

I said that it would take eighty seconds to refill the auxiliary reservoir, that is, provided it was completely empty. If the reservoir was charged to seventy pounds and you let out seven to ten pounds, we usually take about twenty-five seconds to refill it with the original seventy pounds. That is to replace the seven to ten pounds. It would only take eighty seconds to fill it with the full seventy pounds.

It was not necessary for me to get this information that I have been giving with reference to the application of air brakes, etc., out of any book, but I can probably produce three or four books containing the

(Testimony of John Geach.)

information. It is absolutely necessary to study the air-brake [159] system to obtain a knowledge of it. It is absolutely necessary. I studied it possibly five or six weeks ago.

Q. I will ask you if it is not a fact that if you put on ten pounds of air application, service application, on an engine drawing twelve cars similar to what has been described here, and under the conditions described here, and you put it on for a distance of two hundred feet, if it would not stop your train still?

A. That would depend largely upon whether the train was sliding, or whether the wheels were sliding.

Q. I am asking *you* to the facts as outlined to you in my question?

A. Yes, ought to stop within two hundred feet.

Q. And suppose you put on the seventy pounds you would say it would stop it in what distance?

A. Very little difference.

Q. Very little difference whether you put on the seventy pounds or ten pounds?

A. I stated, if the wheels were sliding there would be very little difference.

I said on a previous occasion, if there was no frost on the track and the wheels were rolling I would not say it could be stopped below forty-five feet. I don't believe it could be done in forty-five feet. I don't believe it could be done in sixty feet. It is [160] pretty hard to tell in what distance it could be done. Under these circumstances, as you have given me, it would run along, sliding on the track, and it is a physical impossibility for a man to come upon the

(Testimony of John Geach.)

stand and tell in what time it could actually be done in. *There certain* conditions under which it could be done quick. I don't know whether in my experience I have seen a train of twelve cars going at a rate of speed of six miles an hour, with an engine, stopped in forty-five feet.

I have observed in my experience as a railroad man the stopping of trains, and an engine, at certain rates of speed, and have been called upon to stop trains within a certain distance. If you threw it into what is commonly called the big hole, the effect of the distance in which you could stop the engine would depend entirely upon the conditions. The throwing of the engine into what is called the "big hole" means that the brakes apply at once. It does not mean the reversing of the engine. It is not a fact that you can stop your engine quicker by putting the air on and throwing into the reverse than you could by simply turning the air on. It is not a common rule to throw it into the reverse. The necessity for sanding the track depends largely upon the conditions, as I stated before in regard to the relation of adhesion; it will reduce the [161] ratio of adhesion to about one-fifth instead of one-sixteenth. If you sanded the track it would have a tendency to stop your engine quicker than if you didn't sand it. You generally put sand on the track when you want to make an emergency stop, but it does not always hit the track; but you always put it on. The sand is placed in such a position that it comes down through a pipe from the engine. That pipe is placed directly

(Testimony of John Geach.)

under the engine and over the track so the sand will go right down on the track when it is needed. The pipe leading from the engine goes down through the engine and immediately in front of the wheel of the engine, and comes down within a distance of two or three inches of the track, or four or five inches. The wheels do not have the same tendency to slide on the track when you put sand on it as they do when you do not. The sanding of the track, I admit, has a tendency to keep the wheels from sliding. I also admit that it has a tendency to stop the engine quicker when you sand the track than when you do not.

If you were going at a rate of speed of twenty miles an hour, under the circumstances that have been related to me in this case, you could probably stop the train in five or six hundred feet. I would not want to give a guess as to how quickly it could be stopped. [162]

Q. You want the jury to understand that you could not give any definite idea as to how soon it could be stopped, either going at the rate of six miles an hour or twenty miles an hour?

A. That would depend on the conditions, and upon whether there was any sand used on the rails.

Q. Well, suppose sand had been put on, in what distance would you say it could be stopped?

A. Probably four or five hundred feet.

Q. Going at the rate of twenty miles an hour.

A. Yes, sir.

If it was going at the rate of six miles an hour, and

(Testimony of John Geach.)

they had used sand, I should say it could probably have been stopped in two hundred feet. If the wheels were sliding, I would say that the brakes would have no effect. Under these conditions, I would say not.

I said that it took about eighty second to raise the pressure in the auxiliary reservoir from atmospheric to a seventy pounds pressure. I said it would take about half that time to put in fifty-five pounds.

Witness excused. [163]

[Testimony of George T. Spaulding, for Defendants.]

GEORGE T. SPAULDING, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—I am acting in the capacity of traveling engineer for the Milwaukee road. I have been employed in the railroad service about fifteen years. I worked as a wiper, locomotive fireman, engineer, and traveling engineer. I have been a traveling engineer about four years. I put in seven years as an engineer running an engine.

I am familiar with the space within which it is reasonable and probable that trains can be brought to a stop, under given conditions.

I am familiar with the Gondolas that are used by the Chicago, Milwaukee & St. Paul Railway Company. I am also familiar with the braking appa-

(Testimony of George T. Spaulding.)

tus on these Gondola cars. The weight of an empty Gondola car is forty thousand pounds. I am familiar with the braking efficiency of a Gondola of the kind in use by this Company. We have some of the New York Quick Action brakes, and some of the Westinghouse brakes. These are a good, efficient braking apparatus and are the kind usually in use. There is no practical [164] difference between the two brakes. There is none to my knowledge. The braking efficiency of a Gondola loaded to the capacity of forty thousand pounds is usually about seventy per cent. The braking power against the wheels would be about twenty-eight thousand pounds. The capacity of a Gondola is about one hundred thousand, the total weight would be, when it is loaded, about one hundred and forty thousand pounds.

The braking efficiency is not increased by the load. The load decreases the braking efficiency materially. When the car is loaded, there is no more than twenty-eight thousand pounds pressure against the brakes. An empty Gondola has twenty-eight thousand pounds braking efficiency against forty thousand pounds of weight, where a loaded Gondola has about twenty-eight thousand pounds against a hundred and forty thousand pounds load.

I am familiar with engine No. 1163. It is equipped with air-brakes of the standard make and efficiency.

Q. I will ask you to consider the following hypothetical state of facts: Assuming that switch engine

(Testimony of George T. Spaulding.)

No. 1163 is backing westward, pulling a train of twelve loaded cars with coal and coke, the total estimate of the weight of the train being seven hundred and fifty tons; and assume that it is going from the Butte yards [165] to the Butte, Anaconda & Pacific transfer, and at a point some hundred feet east of the Montana street crossing on a grade of one-half of one per cent, and upon a curve, the train is going at that time at a rate of speed estimated at from eight to ten miles an hour, and at that point a service application is made from seven to ten pounds pressure and continued for a known space, and then is released, and the train runs a little bit farther and then at a point seventy-five feet east of the crossing which I have mentioned, the emergency application is made; it is a clear, cold crisp morning in November, the rails are frosty; at the time the emergency brake is applied, or the emergency application is applied, the speed of the train is approximately six miles per hour. In view of those conditions, in what space would you say it was reasonable and probable that the train could be brought to a stop. There has been a service application of from seven to ten pounds put on for the purpose of reducing the speed of the train from the time of coming around the curve and the speed of the train has been slightly checked—probably two miles per hour—and then a short while after this has been released, and the emergency application is applied, or is made.

A. Well, I should say, ninety feet; it would run upwards of ninety feet. [166]

(Testimony of George T. Spaulding.)

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I would say it could be done in that space from the facts mentioned in the question. I took into consideration the condition of the rail, its being frosty, and the pressure in the brake, at the time, the fact of there being a slight application and then released, that is a service application.

Q. How long would you say it would take to fill up this tank, supposing you drew off seven pounds, seven to ten pounds of air, how long would it take to refill that?

A. Twenty-five seconds, I should judge.

Q. Now, assuming the facts to be that you are going at the rate of six miles an hour, that your braking power was in good condition, and that you had twelve cars attached to engine 1163,—which we will assume for the purpose of this question was in good condition, and the air and braking power was in good condition, and the train going down a grade of one-half of one per cent, and you used every means at your command, in what distance would you say that train could be stopped,—just eliminating the frosty condition of the track, and eliminating the service application? A. Eighty feet.

Q. Going at the rate of six miles an hour?

A. Yes, sir. [167]

Q. Would you say that, going along with twelve cars at the rate of six miles an hour over a one-half of one per cent grade, with an engine similar to 1163, a switch engine weighing sixty-five tons, and you

(Testimony of George T. Spaulding.)

used the emergency and sanded the rails, you could stop it in a distance of less than eighty feet?

A. You could if your sanders are working in perfect condition. Yes, if everything is in working condition, certainly you could.

Q. In what distance could you stop it under those conditions?

A. Perhaps ten feet, probably seventy feet.

You can stop an engine in a shorter distance by sanding the track than you can by not sanding it.

Q. Supposing you put on the service application of from seven to ten pounds of air for a distance of two hundred feet, I will ask you if it is not a fact that that would stop your engine and train going at the rate of six miles an hour, in two hundred feet, under the conditions described to you?

A. Eliminating the frosty rail?

Q. Yes? A. Yes.

With a frosty rail, I would say you could stop it by putting on a service application of ten pounds in going a distance of perhaps a hundred and fifty feet. If the rails were frosty and you put on a service [168] application of ten pounds, I would not wish to make a statement as to what distance it could be stopped in. I have seen trains stopped under similar conditions, but the distance varies so I couldn't tell in what distance it could be stopped. The distance varies at which a train may be stopped on a slippery rail. I can't say, exactly, in what distance I have seen it done. I have seen it done at various times during the winter season. I don't know as it

(Testimony of George T. Spaulding.)

was under the same conditions you have named in this case, with the same number of cars, but I have seen it under the same condition as to rail. If the rails were frosty, I would not want to give an estimate of the distance if could be stopped in.

Q. I am speaking now with a service application of ten pounds and with a frosty rail, you would not want to give an estimate—of the distance—it could be in, if you applied seventy pounds?

A. It would be impossible to apply seventy pounds.

You couldn't get over fifty pounds. It makes very little difference as to how many cars you have attached to your engine as to the distance you can stop it in. It would not make any difference whether you had five cars or twelve cars, or whether you had one car or twelve cars. The train could have been stopped in the same distance that you could have stopped [169] the engine with one car,—if the cars were uniformly loaded.

Mr. Furman asked me with reference to the efficiency of brakes on loaded cars,—he spoke of cars being loaded to the extent of one hundred thousand pounds. I don't know what these cars were loaded with on this particular morning.

Redirect Examination.

(By Mr. FURMAN.)

The WITNESS.—I know what the grade is approaching Montana street crossing from the east. It is three-quarters of one per cent.

(Testimony of George T. Spaulding.)

(By Mr. WHEELER.)

The WITNESS.—It would make a difference in the stopping of an engine or train if the grade was one-half of one per cent or three-quarters of one per cent. You could not stop as quickly on a three-quarters of one per cent grade as you could on a one-half of one per cent grade. As to the distance in number of feet, I could only guess at that; I would have to figure on it. I couldn't give it to you off hand.

Witness excused.

Defendants rest. [170]

[Testimony of W. J. McMaster, for Plaintiff (in Rebuttal).]

W. J. McMASTER, called in rebuttal, on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. Do you know what a retainer upon an engine is? A. Yes, I do.

Explain to the Court and jury what a retainer is.

Mr. FURMAN.—This is objected to as not proper redirect examination, and not rebuttal. If it is material for any purpose at all it should have been introduced upon his direct examination.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. A retainer is right on the end of a car on the brake, and I was sitting on the end of it; now, he claims he made this application; if he did I never

(Testimony of W. J. McMaster.)

heard him, or saw him.

I was sitting right below the brake and about two feet away from the retainer, and I was in a position where I would have been able to have heard the release of the air, if it had been released.

Q. If that service application had been made, and had been released, you would have heard it?

Mr. FURMAN.—This is objected to as not rebuttal. [171]

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. I could have told it by the retainer if the application service had been made.

If the application service had been made I would have heard the noise. I heard the witnesses testify as to what point they put on the service application. I heard no noise of this application service, if they applied the application service. I heard the testimony with reference to the distance it was from the crossing when it was put on.

Q. What effect would the service application have upon the train, that is, as to the jar of the train, if any?

Mr. FURMAN.—I object to this question as calling for the conclusion of the witness, and as not proper rebuttal.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. It would slow it down, more than likely.

(Testimony of W. J. McMaster.)

Q. What have you to say with reference to whether it would cause any jar of the train?

A. Well, a kind of a shoving; that is the way it seems to me, when we would throw on the emergency the train [172] would jar. I think if he threw on the emergency I would feel the jar. I felt a movement in the train about five hundred feet from the crossing.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I was riding on the last car from the engine, on the east end of the car, the extreme east end. I was sitting sidewise on the car looking toward the south. I made a statement to Mr. Webb, the claim agent, after the accident happened on the 6th day of November, 1912. This is my signature attached to this statement. I made that statement in the freight-house.

Q. I will ask you whether you stated to Mr. Webb, at the freight-house, in Silver Bow County, Montana, on the 6th day of November, 1912, as follows: "I was on top of the train about three or four cars from the engine and Murphy was on the rear end of the train. I was sitting down on top of the car facing the south." A. No, I didn't make that statement.

Q. You didn't make that statement?

A. No, sir.

Mr. Murphy was not on the train at all, as a matter of fact.

(Testimony of W. J. McMaster.)

Redirect Examination.

(By Mr. WHEELER.) [173]

The WITNESS.—I noticed the condition of the rails that night with reference to whether or not they were *frost*. I didn't take particular notice, but I don't think they were frosty. I saw the rails, but I didn't notice any frost on them.

Witness excused.

[Testimony of E. S. Ramey, for Plaintiff (in Rebuttal).]

E. S. RAMEY, called in rebuttal on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—Going at the rate of six miles an hour, frost on the rails would have some effect upon the distance in which you could stop a train. It would take a little longer to stop, probably a distance of about ten feet.

Witness excused.

Plaintiff rests. [174]

[Testimony of Ray Webb, for Defendants (in Rebuttal).]

RAY WEBB, called in rebuttal on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—I have testified before in this case. I took the statement of Mr. W. J. McMasters in the freight-house of the Chicago, Milwaukee & St.

(Testimony of Ray Webb.)

Paul Railway Company on the 6th day of November, 1912. He there and then made the following statement to me and I put it down in writing and he signed it:

“I was on top of the train about three or four cars from the engine and Murphy was on the rear end of train. I was sitting down on top of the car facing the south.”

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I put down the statement on the 6th day of November, the day after the accident. I don't know what day this was with reference to the date the inquest was held; this was soon after the accident. The coroner's inquest had not been held when I took the statement of the witnesses. My object was to find out just exactly how the accident happened as soon as I could.

Q. At the time you got this statement, Mr. McMasters [175] knew that Mr. Murphy was not on the train at all that night?

A. I didn't know it until I heard it testified to here.

I didn't know where he was on that night. I was told by all the men. I didn't get any statement from Mr. Murphy that night or the next day.

Witness excused.

Testimony closed.

The foregoing is all of the testimony offered and introduced upon the trial of the above-entitled action.

**[Motion for Order Directing Jury to Return Verdict
for Defendants, etc.]**

Mr. FURMAN.—Come now the defendants, at the conclusion of the taking of testimony in this cause, and after both parties have announced that they have concluded the taking of testimony, and move the Court for an order directing the jury to return a verdict in favor of the defendants, upon the following grounds and for the following reasons, to wit:

First: Upon the ground and for the reason that the complaint does not state a cause of action; the cause of action sought to be set up by the complaint, or within the complaint, being based upon the doctrine, of the last clear chance; and there is no allegation in the complaint of discovery, as required under the laws of the State of Montana.

Second: There has been a failure of proof upon the part of the plaintiff that, after plaintiff was discovered in a place of danger, that there was still time for the exercise of ordinary care to save plaintiffs intestate from damage.

Third: There is a total failure of proof upon the part of the plaintiff, or at best, a mere scintilla of evidence to the effect that plaintiff's intestate survived for any period, or at all, after the accident.
[177]

Fourth: On the ground and for the reason that the plaintiff's testimony shows clearly, without any contradiction, that the negligence of plaintiff's intestate was concurrent with the negligence of defendants, if the defendants were guilty of negligence

at all. It further shows clearly of plaintiff's intestate was active and continued right up to the very instant of the collision, or accident, which caused the death of plaintiff's intestate.

After argument by respective counsel the Court said:

The COURT.—The motion made by counsel for defendants at the close of court on yesterday is denied.

To which ruling of the Court in denying defendants motion for a directed verdict, counsel for defendants asked for and was allowed an exception. [178]

Thereupon, the jury, in charge of a sworn bailiff, retired to consider of their verdict; and, afterwards, on the 22d day of May 1914 the jury returned into court, with their verdict, signed by their foreman, which verdict is in words and figures as follows, to wit:

(Title of Court and Cause.)

Verdict.

“We, the jury in the above-entitled cause, find our verdict in favor of David Clement, as Administrator of the Estate of David Clement, Jr., deceased, and against the defendants and we assess the damages of the plaintiff at the sum of \$7500.00—Seven Thousand & Five Hundred Dollars.

“PARKER RAND,

“Foreman.” [179]

To which verdict defendants then and there duly excepted.

That thereafter, on the 22d day of May, 1914, the said verdict was filed by the clerk of said court in said cause; and thereupon the said jury were discharged from further consideration of the case.

Thereafter, on May 28, 1914, the Court entered judgment on the verdict in favor of the plaintiff; to which order the Court and the judgment entered thereon counsel for defendants then and there duly excepted.

That, on the 23d day of May, 1914, the Court granted the defendants thirty days in addition to the statutory time within which to prepare and serve proposed draft of bill of exceptions in said cause.

WHEREFORE, the defendants above named pray the Court that the foregoing bill of exceptions may be settled and allowed as and for a bill of exceptions, showing all the evidence given on the said trial and the proceedings had therein.

B. K. WHEELER,

H. G. MURPHY,

Attorneys for Defendants. [180]

[Admission of Service of Bill of Exceptions.]

Service of the above and foregoing Bill of Exceptions accepted, and copy thereof received, this 19th day of June, A. D. 1914.

B. K. WHEELER,

B. K. WHEELER,

Attorneys for Plaintiff.

[Order Settling Bill of Exceptions, etc.]

I hereby certify that the above and foregoing Bill of Exceptions is a true and correct bill of exceptions;

156 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*

and order that the same be signed, settled, allowed, and filed, this 19 day of October, 1914.

GEO. M. BOURQUIN,

Judge.

Filed Feb. 3d, 1915. Geo. W. Sproule, Clerk.
[181]

That on January 23, 1915, an Assignment of Errors was duly filed herein, in the words and figures following, to wit: [182]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation;
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Cor-
poration; J. E. WOODS, and M. I. CHAP-
PELL,

Defendants.

Assignment of Errors.

Plaintiffs in error, defendants above named, in connection with their petition for writ of error herein, specify the following particulars wherein error was committed in this said cause:

I.

ERRORS OF LAW.

1. The Court erred in overruling defendants' separate demurrers, for the reason that

a. The complaint fails to allege discovery by the defendants, or any of them, of plaintiff's intestate in a place of peril.

b. It is evident from the complaint that plaintiff's intestate drove upon the defendant corporations' railroad track into a place of danger, without looking or listening. [183]

2. The Court erred in denying defendants' motion for a directed verdict, made on their behalf at the conclusion of the taking of testimony, for the reason that

a. Plaintiff failed to prove that David Clement, Jr., survived the accident for an appreciable time.

b. It appeared from the evidence that plaintiff's intestate was never discovered by the defendants, or any of them, in a place of peril.

c. It appeared from the evidence that the death of plaintiff's intestate was instantaneous.

d. It appeared from the evidence that the negligence of plaintiff's intestate was continuing until the very instant of accident.

3. The Court erred in entering judgment upon the verdict for the plaintiff, for the reason that

a. The evidence is not sufficient to support a verdict, for the reason that

(1) Under the pleadings the plaintiff relies on the doctrine of the last clear chance, and fails to prove discovery.

(2) The evidence does not show survival after the accident.

(3) The evidence affirmatively shows instantaneous death of plaintiff's intestate.

(4) The evidence conclusively shows concurrent negligence on the part of plaintiff's intestate.

II.

ERRORS RELATING TO THE ADMISSION AND REJECTION OF TESTIMONY.

1. The Court erred in overruling defendants' objection to the question asked of plaintiff's witness Willoughby, on direct examination, in the following respect:

“Q. Did you examine the track for the purpose of [184] ascertaining whether or not there was any blood, or anything else on the track?

“Mr. FURMAN.—I object to this question as leading, and also suggestive.

“Mr. WHEELER.—This is for the purpose of fixing the place, as near as he can, where the body first struck the track.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“Q. Go ahead now and state—where would you say that was with reference to being west of the crossing?

“A. Where the body laid?

“Q. Yes, where the body laid.

“A. Around seventy-five feet, maybe more.

“Q. Well, I am asking you where the point was that you first found any blood on the rail, or on the tracks?

“A. Probably halfway from where the body was lying to Montana Street.”

2. The Court erred in overruling defendants' objection to the question asked of plaintiff's witness Glover, on direct examination, in the following respect:

“Q. Do you know what common laborers got in this community, when they worked on the service?

“Mr. FURMAN.—We object to this as incompetent, irrelevant, and immaterial. He can testify what this boy was actually getting, but not what other laborers got.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“Well, laborers received from \$3.00 to four dollars per day.

“They received from three to four dollars a day for [185] surface work and three dollars and half per day for miners.”

3. The Court erred in sustaining plaintiff's objection to the question asked of the witness Glover, on cross-examination, in the following respect:

“Q. Did he have anything coming at the time of his death?

“Mr. WHEELER.—This is objected to as in-

competent, irrelevant and immaterial and as not proper cross-examination.

“Objection sustained.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.”

4. The Court erred in overruling defendants’ objection to the question asked of plaintiff’s witness Glover, on redirect examination, in the following respect:

“Q. For what distance was Montana Street torn up south of the crossing?

“Mr. FURMAN.—I object to this as incompetent, irrelevant and immaterial.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“A. It was torn up over a distance of probably two hundred feet from the track to a point about ten hundred feet west of Montana Street going toward the ranch, that is south, on the side of the cemetery.”

5. The Court erred in overruling defendants’ objection to the question asked of plaintiff’s witness M. I. Chappell, on direct examination, in the following respect: [186]

“Q. Was there any flagman at the crossing?

“Mr. FURMAN.—We object to this question as incompetent, irrelevant and immaterial, no damage being predicated upon, or based upon, the failure to maintain lights, or to maintain a

flagman at this crossing.

“THE COURT.—The objection is overruled. It might make a difference in the degree of care, or diligence, on the part of the engineer to exercise. If there was a flagman there, the engineer might rely, to some extent, on him, but if there was none there, and he knew it it might require more diligence on his part.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“There was not.”

6. The Court erred in overruling defendants’ objection to the question asked of plaintiff’s witness M. I. Chappell, on direct examination, in the following respect:

“Q. What did you notice with reference to any movements of any part of the body?

“Mr. FURMAN.—We object to this as leading and suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“A. Merely gasping a little, frothing at the mouth, as if in his last struggles for life; I considered him to be beyond all human aid at the time.”

7. The Court erred in overruling the following objections of defendants to the questions asked of plaintiff’s witness M. I. Chappell, on direct examination, in the following [187] respects:

“Q. State whether or not you noticed any blood or anything else upon the rails of the track prior to the time you saw the body east of a point where you found the body.

“Mr. FURMAN.—This is objected to as leading and also suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and allowed an exception.

“A. I don't quite understand your question.

“Q. Well, was there anything found by you with reference to parts of the body east of the place where you found the body itself, the main portion of the body?

“A. Before making my first examination of the body, do you mean?

“Q. At any time.

“A. I saw that afterward, yes.

“Q. What did you find there?

“A. His hand was picked up about, I should judge, ten feet east of the body, picked up by the assistant undertaker; I was with him at the time.

“There was nothing else that I could call to mind that was found there.

“Q. Was there any blood or anything of that kind?

“Mr. FURMAN.—I object to this as leading and suggestive.

“Objection overruled.

“To which ruling of the Court counsel for de-

fendants asked for and was allowed an exception.

“Q. About how far east of the body was it that [188] you found the blood?

“Mr. FURMAN.—I object to this as leading and also a repetition.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.

“A. If I remember rightly it was between where the hand was picked up and the location of the body.

8. The Court erred in overruling the defendants' objection to the question asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respect:

“Q. What have you to say as to whether or not it should be rung continuously?

“Mr. FURMAN.—This is objected to as leading and suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.

“A. The rule calls for the bell to be rung upon approaching all crossings at grade, and continuously rung until the crossing is passed.”

9. The Court erred in denying defendants' motion to strike out the testimony of the plaintiff's witness M. I. Chappell given on his cross-examination, in the following respect:

“Mr. FURMAN.—I move to strike out the testimony of the witness with reference to this, as to the manner of how the wagon slid along the rails, for the reason that it is a conclusion and not a statement of any physical fact.” [189]

“By Mr. WHEELER.—When the engine first struck the wagon you saw it then?

“A. Yes, sir.

“Q. And you saw it for how long a distance after that?

“A. I didn’t see it after that until after it stopped and I went to the rear end of the engine.

“Q. Was the wagon upset?

“A. No, sir, only partially.

“Motion to strike denied.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.

10. The Court erred in overruling defendants’ objection to the following question asked of the defendants’ witness J. E. Woods, on cross-examination, in the following respect:

“Q. What have you to say with reference to whether or not you used any sand, or whether there was any sand on the engine that morning?

“Mr. FURMAN.—I object to this for the reason that there is no defective appliance *complained on* the part of the plaintiff, and no negligence in not applying sand upon the tracks, and no defects in the appliances on the engine.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.” [190]

WHEREFORE, defendants above named pray that the petition for writ of error be granted; and that, for the reasons aforesaid, and for divers and sundry other reasons the judgment entered herein on the 28th day of May, 1914,—which said judgment was suspended by the filing of defendants’ petition for new trial on the 19th day of June, 1914, and re-entered by the order denying a new trial made and entered on the 5th day of December, 1914,—be reversed.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Defendants, Plaintiffs in Error.

Filed Jan. 23, 1915. Geo. W. Sproule, Clerk.
[191]

That on January 23, 1915, Petition for Writ of Error was duly filed herein, in the words and figures following, to wit: [192]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation; J.
E. WOODS, and M. I. CHAPPELL,
Defendants.

Petition for Writ of Error.

Now come Chicago, Milwaukee & St. Paul Rail-
way Company, a corporation; Chicago, Milwaukee
& Puget Sound Railway Company, a corporation;
J. E. Woods, and M. I. Chappell, defendants herein;
and say:

That on or about the 28th day of May, A. D. 1914,
this Court entered judgment herein in favor of the
plaintiff and against these defendants, in which said
judgment and the proceedings had prior thereunto
in this said cause, certain manifest errors have in-
tervened and were committed, to the great prejudice
of these said defendants,—all of which will in more

detail appear from the Assignment of Errors filed with this petition.

WHEREFORE, defendants, feeling themselves aggrieved by the said judgment, come now and pray the Court for an order allowing the said defendants to prosecute a writ of error to the Honorable, the United States Circuit Court of [193] Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided for the correction of the errors so complained of; that an order be made fixing the amount of supersedeas bond in this said case; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

And the said defendants herewith submit their assignment of errors in accordance with the rules of the United States Circuit Court of Appeals and the course and practice of this Honorable Court.

And your petitioners will ever pray.

GEORGE F. SHELTON,

FRED J. FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants.

Filed Jan. 23, 1915. Geo. W. Sproule, Clerk.
[194]

Thereafter, on January 23, 1915, Order Allowing Writ of Error was duly made and entered herein, in the words and figures following, to wit: [195]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation; J.
E. WOODS, and M. I. CHAPPELL,
Defendants.

Order Allowing Writ of Error.

On this 23 day of January, A. D. 1915, came the defendants herein, by their attorneys, and filed herein and presented to the Court their petition praying for the allowance of a writ of error, together with an assignment of errors intended to be urged by them; praying also that an order be made fixing a supersedeas bond; and praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises;

On consideration whereof, the Court does allow the writ of error upon the said defendants' giving bond according [196] to law in the sum of Eighty-five Hundred Dollars (\$8500.00).

GEO. M. BOURQUIN,
Judge of the District Court of the United States, for
the District of Montana.

Filed and entered Jan. 23, 1915. Geo. W.
Sproule, Clerk. [197]

Thereafter, on January 25, 1915, Bond on Writ of Error was duly filed herein, in the words and figures following, to wit: [198]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation, J. E.
WOODS, and M. I. CHAPPELL,
Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Alex. J. Johnston and J. K. Heslet, as sure-
ties are held and firmly bound unto plaintiff, David

Clement, as administrator of the estate of David Clement, Jr., deceased, in the full and just sum of Three Hundred Dollars (\$300.00), to be paid to the said David Clement, administrator, his executors, administrators and assigns; to which payment well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 25th day of January, A. D. 1915.

WHEREAS, lately, at a District Court of the United States, for the District of Montana, in a suit pending in the said court, between the said David Clement, Administrator of the Estate of David Clement, Jr., deceased, plaintiff, [199] and the said Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods and M. I. Chappell, Defendants, a judgment was rendered against the said defendants; and the said defendants, having thereafter obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said David Clement, Administrator, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, on the 22 day of February, 1915, next:

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants shall prosecute the said writ of error to effect, and

answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

ALEX J. JOHNSTON.

J. K. HESLET.

United States of America,
State and District of Montana,
County of Silver Bow,—ss.

Alex. J. Johnston and J. K. Haslet, being severally duly sworn, on oath, each for himself, says: That he is one of the sureties who subscribed the above and foregoing bond; that he is a resident and householder within the city of Butte, County of Silver Bow, State of Montana, and is worth the sum mentioned in the said undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ALEX J. JOHNSTON,

J. K. HESLET.

Subscribed and sworn to before me this 25th
[200] day of January, A. D. 1915.

[Seal]

A. J. VERHEYEN,

Notary Public for the State of Montana, Residing at
Butte, Montana.

My commission expires Jan. 23, 1918.

Approved by:

_____,
United States District Judge for the District of
Montana.

Filed Jan. 25, 1915. Geo. W. Sproule, Clerk.
[201]

Thereafter, on January 25, 1915, a Supersedeas Bond on Writ of Error was duly filed herein, in the words and figures following, to wit: [202]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation, J. E.
WOODS, and M. I. CHAPPELL,
Defendants.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Chicago, Milwaukee & St. Paul Railway
Company (a corporation), Chicago, Milwaukee &
Puget Sound Railway Company (a corporation), J.
E. Woods, and M. I. Chappell as principals, and Alex.
J. Johnston and J. K. Heslet, as sureties, are held and
firmly bound unto David Clement, Administrator of
the Estate of David Clement, Jr., deceased, plaintiff
above named, in the full and just sum of Eighty-five
Hundred Dollars (\$8500.00), to be paid to the said
David Clement, Administrator, plaintiff, as afore-
said, his certain attorneys, executors, administrators,
or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally by these presents. [203]

Sealed with our seals, and dated this 25th day of January, A. D. 1915.

WHEREAS, lately, at a District Court of the United States, for the District of Montana, in a suit pending in the said court, between the said David Clement administrator of the Estate of David Clement, Jr., deceased, plaintiff, and the said Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants, a judgment was rendered against the said defendants; and the said defendants, having thereafter obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said David Clement, administrator, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 22d day of February, next:

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void;

otherwise to remain in full force and virtue.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY,

J. E. WOODS,

M. I. CHAPPELL,

By FRED J. FURMAN,

Their Attorney. [204]

ALEX J. JOHNSTON,

J. K. HESLET.

United States of America,

State and District of Montana,

County of Silver Bow,—ss.

Alex J. Johnston and J. K. Heslet, being severally duly sworn, on oath, each for himself says: That he is one of the sureties who subscribed the above and foregoing bond; that he is a resident and householder within the city of Butte, county of Silver Bow, State of Montana, and is worth the sum mentioned in the said undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ALEX J. JOHNSTON,

J. K. HESLET.

Subscribed and sworn to before me this 25th day of January, 1915.

[Seal] A. J. VERHEYEN,
Notary Public for the State of Montana, Residing
at Butte, Montana.

My Commission expires Jan. 23, 1918.

Approved by:

_____,
United States District Judge for the District of
Montana.

Filed Jan. 25, 1915. Geo. W. Sproule, Clerk.
[205]

That on January 23, 1915, a Writ of Error was
duly issued herein, which said Writ of Error is
hereto annexed and is in the words and figures fol-
lowing, to wit: [206]

*In the United States Circuit Court of Appeals, in and
for the Ninth Circuit.*

Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States, to the Honorable
the District Court of the United States for the
District of Montana, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment, of a plea which is in
said District Court before you, between David Cle-
ment, as administrator of the Estate of David
Clement, Jr., deceased, plaintiff, and Chicago, Mil-
waukee & St. Paul Railway Company (a corpora-

tion), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their petition and assignment of errors appears, we, being willing that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for [207] the Ninth Circuit, at San Francisco, California, in said Circuit, on the 22 day of Feb., 1915, next, within thirty (30) days hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of the said District Court of the United States for the District of Montana, this 23d day of January, A. D. 1915, and in the one hundred and thirty-ninth

year of the Independence of the United States of America.

[Seal]

GEO. W. SPROULE,
Clerk of the District Court of the United States, for
the District of Montana.

By Harry H. Walker,
Deputy Clerk.

Allowed by:

GEO. M. BOURQUIN,
United States District Judge, for the District of
Montana.

Service of the above and foregoing Writ of Error
is hereby admitted, and receipt of copy thereof ac-
knowledged, this 25th day of January, A. D. 1915.

B. K. WHEELER,
HOMER G. MURPHY,
J. A.

Attorneys for Plaintiff in Said District Court of the
United States for the District of Montana, De-
fendant in Error. [208]

ANSWER OF COURT TO WRIT OF ERROR.

The answer of the Honorable, the District Judge
of the United States for the District of Montana, to
the foregoing Writ:

The record and proceedings whereof mention is
within made, with all things touching the same, I cer-
tify, under the seal of the said District Court of the
United States, to the United States Circuit Court
of Appeals for the Ninth Circuit, within mentioned,
at the day and place within contained, in a certain

schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,
Clerk. [209]

[Endorsed]: No. 124. In the District Court of the United States, for the District of Montana. David Clement, as Administrator of the Estate of David Clement, Jr., Deceased, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company et al., Defendants. Writ of Error. Filed Jan. 25, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. [210]

Thereafter, on January 23, 1915, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to wit: [211].

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Citation on Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States, to David Clement, as Administrator of the Estate of David Clement, Jr., Deceased, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, on the 22 day of Feb., 1915, next, pursuant to a writ of error

filed in the Clerk's Office of the District Court of the United States for the District of Montana, wherein Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants in said District Court, are plaintiffs in error, and you, the said David Clement, as administrator of the Estate of David Clement, Jr., deceased, plaintiff in said District Court, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. GEORGE M. BOURQUIN, United States District Judge, for the District of Montana, this 23 day of Jan., A. D. 1915.

GEO. M. BOURQUIN,
United States District Judge for the District of
Montana. [212]

Due personal service of the foregoing Citation made and admitted, and receipt of copy acknowledged, this 25th day of January, A. D. 1915.

B. K. WHEELER,
HOMER G. MURPHY,

J. A.

Attorneys for Plaintiff in Said District Court and
Defendant in Error. [213].

[Endorsed]: No. 124. In the District Court of the United States, for the District of Montana. David Clement, as Administrator of the Estate of David Clement, Jr., Deceased, Plaintiff, vs. Chicago, Mil-

waukee & St. Paul Railway Company et al., Defendants. Citation on Writ of Error. Filed Jan. 25, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. [214]

Praecipe [for Transcript of Record].

Thereafter, on February 3, 1915, a Praecipe for Transcript was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, District
of Montana.*

No. 124.

DAVID CLEMENT, Admr., etc.,

Plaintiff,

vs.

C. M. & ST. PAUL RY. CO., a Corp., et al.,

Defendants.

The Clerk of said Court will please insert the following in Transcript on Appeal: Amended Complaint, Subpoena, Separate Demurrers of Ry. Co., Chappel and Woods, Answer to Am. Complaint, Verdict, Judgment, (Petition for New Trial), (Bill of Exceptions), Opinion and Order of Court Denying New Trial, Pet. for Writ of Error, Order Allowing Writ of Error, Writ of Error, Assignments of Error, Citation on Writ of Error, Supersedeas Bond on Writ of Error and Bond on Writ of Error.

Dated Feb. 1, 1915.

SHELTON & FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants.

Filed Feb. 3, 1915. Geo. W. Sproule, Clerk.
[215]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 216 pages, numbered consecutively from 1 to 216, inclusive, is a full, true and correct transcript of all things mentioned in the praecipe for transcript herein, copy of which is included in said transcript, except the subpoena, which is not of record in said court, as appears from the original files and records of said court in my custody as such clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Thirty-three 85/100 Dollars (\$33.85/100), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 13th day of February, A. D. 1915.

[Seal]

GEO. W. SPROULE,

Clerk.

[Ten Cents Internal Revenue Stamp. Canceled
February 13, 1915. G. W. S.] [216]

[Endorsed]: No. 2570. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, J. E. Woods and M. I. Chappell, Plaintiffs in Error, vs. David Clement, as Administrator of the Estate of David Clement, Jr., Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed February 16, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.